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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 475

JOSEPH D. McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, PETITIONER,

vs.

BERWIND-WHITE COAL MINING COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED OCTOBER 18, 1939.

CERTIORARI GRANTED DECEMBER 4, 1939.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN SUPREME COURT OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

THE BERWIND-WHITE COAL MINING COMPANY, Petitioner,

for a certiorari order against

JOSEPH D. McGOLDRICK, as Comptroller of the City of New York, Respondent

STATEMENT UNDER RULE 234

This is a certiorari proceeding to review a final determination of the Comptroller of the City of New York, dated July 1, 1937, of an application made in accordance with Local Law No. 20 of 1934, as amended, by The Berwind-White Coal Mining Company for a review and reconsideration of the taxes assessed and determined against it under such law by the Comptroller of the City of New York for the period December 10, 1934 to December 31, 1935.

The order of certiorari was signed by Mr. Justice Edward [fol. 2] J. McGoldrick on July 22, 1937, entered on July 24, 1937, and served on July 27, 1937 on Frank J. Taylor, Comptroller of the City of New York, then the Respondent, together with a bond in the amount of $500 furnished by The Berwind-White Coal Mining Company and approved by Mr. Justice Edward J. McGoldrick on July 22, 1937.

The Comptroller made his return to the order of Certiorari on August 18, 1937.

Davis Polk Wardwell Gardiner & Reed, 15 Broad Street, New York City, appear as attorneys for The Berwind-White Coal Mining Company.

Paul Windels, Esq., Corporation Counsel, originally appeared for Respondent Frank J. Taylor, Comptroller of the City of New York, the Respondent at present is represented by William C. Chanler, Esq., Corporation Counsel of the City of New York. Frank J. Taylor, originally named Respondent as Comptroller of the City of New York, was succeeded as Comptroller of the City of New York on January 1, 1938, by Joseph D. McGoldrick, the Respondent. There have been no other changes in attorneys of parties herein.

[fol. 3] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, SPECIAL TERM, PART II

[Title omitted]

ORDER REQUIRING COMPTROLLER TO MAKE RETURN—July 22, 1937

To Honorable Frank J. Taylor, Comptroller of the City of New York:

On reading and filing the annexed petition of The Berwind-White Coal Mining Company duly verified July 22nd, 1937, whereby it appears that Frank J. Taylor, as Comptroller of the City of New York, has made a final determination after a hearing, to the effect that petitioner, The Berwind-White Coal Mining Company, is liable to the City of New York for taxes in the amount of $140,517.97 and penal-
[fol. 4] ties in the amount of $36,185.92, a total of $176,703.89, assessed by the said Comptroller under Local Law No. 20 of the City of New York for the year 1934, as amended, upon the amount of receipts from sales of coal made by petitioner to purchasers in New York City during the period from December 19, 1934 to December 31, 1935, and that petitioner has deposited under protest with the said Comptroller the amounts assessed as aforesaid as taxes and penalties;

And the Court, in its discretion, having dispensed with notice of the application for this order,

Now, on motion of Davis Polk Wardwell Gardiner & Reed, attorneys for the petitioner, it is

Ordered that you, Frank J. Taylor, Comptroller of the City of New York, within twenty days after the service of this order upon you, do certify and return to this Court, in the office of the Clerk of the County of New York, at the County Court House, Centre and Pearl Streets, all and singular your proceedings, decisions, determinations and actions in the premises, with the dates thereof, respectively, and all and singular the evidence, documents and records and all other papers before you, or which were submitted to you concerning the taxation of petitioner, with your determination, particularly the evidence and your determination on the taxability, under Local Law No. 20 of 1934 of the City of New York, as amended, of the sales of coal made by petitioner, and the receipts therefrom, during the

period from December 10, 1934 to December 31, 1935, to the end that your decision and action may be reviewed and corrected on the merits by this Court and that any errors committed by you in determining and making the aforesaid assessment against the petitioner, under the said Local [fol. 5] Law No. 20 of 1934, as amended, and in your exacting payment thereof, may be reversed or corrected, according to law, and such other and further relief granted as this Court may deem just and proper; and it is

Further ordered that the petitioner file with the said Comptroller of the City of New York an undertaking of a surety company authorized to do business in the State of New York, as surety, in the sum of $500, to the effect that, if this order be dismissed or if the aforesaid tax sought to be reviewed hereby be confirmed, petitioner will pay all costs and charges which may accrue in the prosecution of this proceeding.

Enter,

E. J. McG., Justice of the Supreme Court.

[fol. 6] IN SUPREME COURT OF NEW YORK

New York County

[Title omitted]

PETITION

To the Supreme Court of the State of New York:

The petition of The Berwind-White Coal Mining Company respectfully shows to this Court:

First. Petitioner, The Berwind-White Coal Mining Company, was at all the times hereinafter mentioned and still is a corporation organized and existing under the laws of the State of Pennsylvania with its principal office and place of business at 1100 Commercial Trust Building, Philadelphia, Pennsylvania, and was and is duly qualified to transact business in the State of New York.

Second. Respondent, Frank J. Taylor, was at all the times hereinafter mentioned and still is Comptroller of the City of New York.

[fol. 7] Third. Petitioner is, and has been for approximately forty years past, engaged in the business of mining, producing and selling bituminous coal. It owns, and during the aforesaid period it has owned, coal mines in the Counties of Cambria and Somerset, in the State of Pennsylvania. The coal which it produces and has produced from such mines is of two kinds, bearing the trade names of (1) Berwind's Eureka and (2) Berwind's Standard C. Prime. Berwind's Eureka coal is produced from a vein known as the "B seam". Berwind's Standard C Prime coal is produced from a vein known as the "C Prime seam". The aforesaid mines owned by petitioner in Pennsylvania covering the B seam and the C Prime seam are and have been the only source of Berwind's Eureka and Berwind's Standard C Prime coal. It is, and has been during the aforesaid period, the practice of petitioner to sell Berwind's Eureka and Berwind's Standard C. Prime coal by such trade names to purchasers in New York City. The principal purchasers of Berwind's Eureka coal are and have been public utility companies and steamship companies. Berwind's Eureka and Berwind's C Prime coal are and have been sold to industrial companies and dealers. All coal sold to purchasers in New York City is, and has been during the aforesaid period, shipped from the aforesaid mines in Pennsylvania directly to the purchasers. Petitioner does not have and has never had any facilities for the storage of coal, and it has never been the practice of petitioner to maintain any coal in storage.

Fourth: The contracts made by petitioner for the sale of coal to purchasers located in New York City, fall into [fol. 8] two classes, namely (1) term contracts and (2) spot contracts. The term contracts require deliveries over a period of time, usually for one year. The spot contracts usually cover a single delivery to be made within a short time after the contract is made. All contracts for the sale of coal to purchasers located in New York City contemplate and require that delivery be made from petitioner's mines in Pennsylvania. In the cases of all the utility companies and most of the steamship companies and most of the other purchasers, the contracts require delivery of the coal to be made free alongside the plants or steamships of the purchaser. In some cases the contracts require delivery to be made to the purchaser free on board cars at the mines,

and in other cases the contracts require delivery to be made free on board cars at Harsimus Pier, Jersey City, New Jersey.

Fifth. Petitioner has consistently maintained for a period of approximately forty years past the following practice in making deliveries of coal to purchasers located in New York City whose contracts require delivery free alongside the purchaser's plants or steamships: Pursuant to orders received from the purchasers at petitioner's New York office, which orders are transmitted to the mines, the coal is mined and placed on board railroad cars at the mines. Such railroad cars are carried over the Pennsylvania Railroad to Harsimus Pier, Jersey City, New Jersey, located on the Hudson River. The coal is then dumped from the cars into barges, each barge being loaded for a particular purchaser to fulfill a particular order. The barges are then towed alongside the purchaser's plant or steamship and are unloaded by the purchaser.

[fol. 9] Sixth: During the period commencing December 10, 1934 and ending December 31, 1935, petitioner made sales of Berwind's Eureka coal in accordance with the practice described in Paragraphs "Third", "Fourth" and "Fifth" hereof, pursuant to term contracts requiring delivery of the coal from petitioner's mines in Pennsylvania, free alongside the plant or steamship of the purchaser, with the following purchasers located in the City of New York:

Brooklyn-Edison Company
The New York Edison Company
The United Electric Light and Power Company
Interborough Rapid Transit Company
Williamsburg Power Plant Corporation
All American Cables, Inc.
Clyde-Mallory Lines
Compagnie Generale Transatlantique
International Mercantile Marine Company
The New York & Porto Rico Steamship Co.
Ocean Dominion Steamship Corporation
Compania Transatlantica

During the same period petitioner made sales of Berwind's Standard C Prime coal in accordance with the practice described in Paragraphs "Third", "Fourth" and "Fifth" hereof pursuant to term contracts requiring delivery of the

coal from petitioner's mines in Pennsylvania, free alongside the purchaser's plant, with the following purchasers located in the City of New York:

L. A. Dreyfus Company
Arbuckle Brothers

During the same period petitioner made sales of Berwind's Eureka coal in accordance with the practice described in [fol. 10] Paragraphs "Third", "Fourth", and "Fifth" hereof pursuant to spot contracts, requiring delivery of the coal from petitioner's mines in Pennsylvania, free alongside the plants or steamships of the purchasers with the following purchasers located in New York City:

Caddell Dry Dock & Repair Company
North Atlantic & Gulf Steamship Company
Pioneer Terminal Corporation
United States Navigation Company

All deliveries of coal pursuant to all the aforesaid contracts were made by petitioner by shipment from petitioner's mines in Pennsylvania pursuant to the terms of said contracts and in accordance with the practice described in Paragraph "Fifth" hereof. All the purchasers named above had purchased from petitioner coal of the trade name specified in the above-mentioned contracts for many years prior to 1935 and such purchases had been made pursuant to the same practice described in Paragraphs "Third", "Fourth" and "Fifth" hereof.

Seventh: During the period commencing December 10, 1934 and ending March 31, 1935 petitioner made sales of Berwind's Eureka coal pursuant to a term contract with New England Steamship Company requiring delivery of the coal to be made from petitioner's mines in Pennsylvania to the purchaser free on board cars at Harsimus Pier, Jersey City, New Jersey. During the period commencing April 1, 1935 and ending December 31, 1935, petitioner made sales of Berwind's Eureka coal pursuant to spot contracts with New England Steamship Company requiring delivery to be made from petitioner's mines in Pennsylvania to the [fol. 11] purchaser free on board cars at Harsimus Pier, Jersey City, New Jersey. All deliveries of coal made by petitioner pursuant to these contracts were made in accordance with the terms of the contract and were completed

by delivery of the coal free on board cars at Harsimus Pier, Jersey City, New Jersey.

Eighth: During the period commencing December 10, 1934 and ending December 31, 1935, petitioner made sales of Berwind's Eureka coal pursuant to spot contracts with Austin Nichols & Company requiring delivery of the coal to be made to the purchaser free on board cars at the mines of the petitioner in Pennsylvania. The aforesaid sales to Austin Nichols & Company were completed by delivery of the coal free on board cars at petitioner's mines in Pennsylvania.

Ninth: On August 18, 1934, Chapter 873 of the Laws of New York of 1934, became effective, authorizing the City of New York, and certain other cities within the State, until December 31, 1935, to impose certain taxes. The said Chapter 873 contained the following provision:

"This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such City, notwithstanding that some act be necessarily performed with respect to such transaction within such limits."

Tenth: Pursuant to the provisions of said Chapter 873, the Municipal Assembly of the City of New York enacted Local Law No. 20 of 1934, which became effective on December 5, 1934. Said Local Law No. 20 was subsequently amended by Local Law No. 24 of 1934, and was again sub-[fol. 12] sequently amended by Local Law No. 23 of 1935. The said Local Law No. 20 as amended imposed a tax of 2% during the period commencing December 10, 1934, and ending December 31, 1935, on the amount of receipts from the sale in the City of New York of tangible personal property, such tax to be collected by the vendor from the purchaser and to be paid to the City of New York by the vendor. The following provision appears in Section 2 of the said Local Law as amended:

"* * * receipts upon which the State of New York and City of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder."

Eleventh: Local Law No. 25 of 1934 of the City of New York, which became effective December 28, 1934, imposed

a tax for the period commencing January 1, 1935 and ending December 31, 1935, of 2% upon the value of certain specified articles of personal property situated or owned within the City of New York, to be paid by the owner, such articles to be valued for the purposes of the tax at the actual purchase price. The said Local Law No. 25 exempts from the tax imposed thereby any article if it is one "upon the receipt from the sale of which a tax has been paid pursuant to the provisions of this law or Local Law No. 20 of 1934 as amended".

Twelfth: Prior to the making of the sales described in Paragraphs "Sixth", "Seventh" and "Eighth" hereof, petitioner was advised by its counsel and took the position that all its sales of coal to purchasers in the City of New [fol. 13] York, made pursuant to the practice described in Paragraphs "Third", "Fourth", and "Fifth" hereof were transactions in interstate commerce; that a tax on the amount of the receipts from such sales would constitute a burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution; and that therefore such sales were not subject to the tax imposed by the aforesaid Local Law No. 20 of 1934, as amended. Consequently, petitioner did not currently report nor currently pay tax under the said Local Law upon the amounts of the receipts from such sales.

Thirteenth: On or about April 25, 1936, respondent sent to the petitioner a letter with certain exhibits attached, giving notice that he had determined that there was due and payable to the City of New York a deficiency of $167,518.10, consisting of $151,008.31 principal amount and $16,429.79 interest, for the period from December 10, 1934 to December 31, 1935, pursuant to Local Law No. 20 of 1934, as amended, and that such determination finally and irrevocably fixed the amount of the tax due, unless application in writing was made for a hearing within thirty days after the date of said letter. A copy of said letter and the exhibits attached thereto is annexed hereto marked Exhibit I and made a part hereof. Upon information and belief the receipts from all the sales described in Paragraphs "Sixth", "Seventh" and "Eighth" were included as taxable receipts by respondent in computing the deficiency asserted in the aforesaid letter of April 25, 1936.

Fourteenth: On May 13, 1936, application was made by the petitioner for a hearing with respect to the respondent's determination disclosed by his letter of April 25, 1936. A [fol. 14] copy of the said application for hearing is annexed hereto marked Exhibit II and made a part hereof. An informal hearing was granted by the respondent and was held in the office of the Emergency Revenue Division, 50 Lafayette Street, New York City, on or about October 5, 1936, at which petitioner contended that the sales described in Paragraphs "Sixth", "Seventh" and "Eighth" were transactions in interstate commerce and therefore, by virtue of the provisions of the Federal Constitution and Local Law No. 20 of 1934 as amended, the sales were not subject to the tax imposed by the said Local Law. The petitioner further contended at such hearing that the sales described in Paragraphs "Seventh" and "Eighth" were transactions consummated outside of the territorial limits of the City of New York and were not subject to the tax imposed by the said Local Law by reason of the provisions of Chapter 873 of the Laws of New York of 1934, quoted in Paragraph "Ninth" hereof. Following the aforesaid informal hearing the case was set down for formal hearing on April 20, 1937. On the said date and on the adjourned dates of May 6, 1937, and May 21, 1937, petitioner made the same contentions and introduced certain oral and written evidence in support of such contentions to the effect that it was not subject to the tax imposed by Local Law No. 20 of 1934 as amended, with respect to the sales of coal described in Paragraphs "Sixth", "Seventh" and "Eighth" hereof.

Fifteenth: By a letter dated July 1, 1937, addressed to the attorneys for the petitioner and received by said attorneys on July 7, 1937, in an envelope postmarked New York, New York, July 6, 1937, respondent gave notice that as a [fol. 15] result of the aforesaid hearings the assessment theretofore made was increased to $177,889.63, consisting of principal $141,497.92 and penalties $36,391.71, and that the determination of such assessment was final and irrevocable. A copy of the said letter and determination is annexed hereto marked Exhibit III and made a part hereof.

Sixteenth. On July 19, 1937, respondent delivered to the attorneys for petitioner another letter dated July 1, 1937,

in substitution for, and superseding the letter referred to in Paragraph "Fifteenth" hereof. Petitioner's attorneys received said letter on July 19, 1937 with the understanding that the time within which petitioner might apply for an order of certiorari was not to be deemed extended beyond the date fixed by their receipt of the original letter referred to in Paragraph "Fifteenth" hereof. The aforesaid letter, delivered on July 19, 1937, gave notice that as a result of the aforesaid hearings the assessment against petitioner, as finally determined by respondent was in the amount of $176,703.89, consisting of principal $140,517.97 and penalties $36,185.92. A copy of the said letter and determination is annexed hereto marked Exhibit IV and made a part hereof. Upon information and belief, the amount of the receipts upon which respondent based the aforesaid final determination consists entirely of receipts from the sales described in Paragraphs "Sixth", "Seventh" and "Eighth" hereof.

Seventeenth: On July 19, 1937, pursuant to Section 7 of Local Law No. 20 of 1934, as amended, petitioner deposited under protest with respondent the aforesaid sum of $176,703.89, the same being the amount of tax and penalties [fol. 16] determined by respondent and herein sought to be reviewed. A copy of petitioner's letter of protest to respondent dated July 19, 1937, which accompanied the aforesaid deposit, is annexed hereto marked Exhibit V and made a part hereof.

Eighteenth. Upon information and belief, respondent has assessed against and collected from several of the purchasers mentioned in Paragraph "Sixth" hereof, the tax imposed by Local Law No. 25 of 1934, with penalties thereon, upon coal purchased by such purchasers from petitioner between January 1, 1935 and December 31, 1935, although the receipts from the sale of the same coal have been determined by respondent to be taxable under Local Law No. 20 of 1934, as amended, and have been included by respondent as taxable receipts in his final determination of tax and penalties herein sought to be reviewed.

Nineteenth. Petitioner claims that the assessment and collection by respondent under Local Law No. 20 of 1934, as amended, of the aforesaid tax and penalties in the amount of $176,703.89 was erroneous and illegal for the following reasons:

1. All the sales and the receipts therefrom, upon which the said assessment was based, namely, the sales described in Paragraph "Sixth", "Seventh", and "Eighth" hereof, were made in and constituted transactions in interstate commerce, and therefore the tax imposed thereon is a burden on interstate commerce in violation of the provisions of the Commerce Clause of the Federal Constitution, and the said sales and the receipts therefrom are not subject to the tax imposed by Local Law No. 20 of 1934, as amended.

[fol. 17] 2. In so far as the said assessment was based upon the sales and the receipts therefrom, described in Paragraphs "Seventh" and "Eighth" hereof, it was erroneous and illegal for the further reason that such assessment violates the provisions of Chapter 873 of the Laws of New York of 1934, in that the said sales constituted transactions consummated outside of the territorial limits of the City of New York.

3. The exaction by respondent of tax, with penalties thereon, under Local Law No. 25 of 1934, from the purchasers, and the exaction of tax with penalties thereon, under Local Law No. 20 of 1934, as amended, from petitioner, with respect to the same items of coal purchased constituted an unlawful double exaction not contemplated by either of said local laws. The assessment and collection by respondent of the aforesaid tax and penalties under the said Local Law No. 25, is in effect an admission by him that the receipts from sales of the coal in respect of which such tax has been assessed and collected are not subject to the tax imposed by the said Local Law No. 20, as amended, and the respondent's exaction of tax and penalties from petitioner with respect to such sales is inconsistent with his exaction of the aforesaid tax and penalties from the purchasers.

4. The exaction from petitioner by respondent of penalties in the amount of $36,185.92, representing between 21% and 31% of the amount of tax assessed, constituted an abuse of the discretion granted to respondent with respect to penalties under Section 15 of Local Law No. 20 of 1934, as amended.

[fol. 18] Twentieth. By reason of the foregoing your petitioner is and will be greatly injured by the aforesaid illegal assessment and collection of taxes and penalties. Your petitioner is advised that the aforesaid action and determi-

nation of respondent may be reviewed by an order of certiorari. No previous application for such order in this matter has been made to any court or judge.

Twenty-First. Submitted herewith for the approval of a Justice of this Court is an undertaking of the National Surety Corporation, a corporation duly authorized to transact business in the State of New York, as surety, in the sum of $500, to the effect that if the order of certiorari hereby prayed for be dismissed, or if the tax sought to be reviewed thereby be confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of this proceeding. The said undertaking, if approved by a Justice of this Court, will be filed with respondent.

Wherefore, your petitioner prays that a certiorari order be granted hereunder, directed to Frank J. Taylor, as Comptroller of the City of New York, commanding him to certify and to return to this Court, in the office of the Clerk of the County of New York, at the County Court House, Centre and Pearl Streets, all and singular his proceedings, decisions, determinations and actions in the premises with the dates thereof, respectively and all and singular the evidence, documents and records and all other papers before him or which were submitted to him concerning the taxation of petitioner, with his determination, particularly the evidence and his determination on the taxability under Local Law No. 20 of 1934 of the City of New York, as [fol. 19] amended, of the sales of coal made by petitioner, and the receipts therefrom, during the period from December 10, 1934 to December 31, 1935, to the end that his decision and action may be reviewed and corrected on the merits by this Court and any errors committed by him in determining and making the aforesaid assessment against petitioner under the said Local Law No. 20 of 1934, as amended, and in exacting payment thereof, may be reversed or corrected according to law and that petitioner may have such other and further relief as to the Court may seem just and proper.

The Berwind-White Coal Mining Company, Petitioner, By O. M. Hinton, Vice-President. Davis Polk Wardwell Gardiner & Reed, Attorneys for Petitioner, Office & P. O. Address, 15 Broad Street, Borough of Manhattan, New York City.

(Verified by O. M. Hinton the 22nd day of July, 1937.)

[fol. 20]

EXHIBITS, ANNEXED TO FOREGOING PETITION

EXHIBIT I

Frank J. Taylor
Comptroller
Milton Solomon
Deputy Comptroller

The City of New York
Department of Finance

April 25, 1936.

Emergency Revenue Division
50 Lafayette Street, New York City

Name Berwind-White Coal Mining [redacted]
Address 1 Broadway, New York
Registration Number Misc.—5

	Tax Deficiency Period Ended	Principal	Interest	Total
Berwind-White Coal Mining Co.	2/28/35	35,547.20	5,687.55	41,234.75
	5/31/35	35,311.28	4,590.47	39,901.75
1 Broadway	8/31/35	33,449.45	3,344.95	36,794.40
New York, New York	12/31/35	46,780.38	2,806.82	49,587.20
	Total	151,088.31	16,429.79	167,518.10

Gentlemen:

The Comptroller hereby gives notice that based upon the exhibits and schedules hereto attached he has determined that there is due and payable to the City of New York a deficiency of $167,518.10 in the amount of the tax (including interest and/or penalties) for the period from December 10, 1934 to December 31, 1935, pursuant to Local Law No. 20 of 1934, as amended.

Notice is hereby given that this determination shall finally and irrevocably fix the amount of tax due unless application in writing is made by you for a hearing thereon within thirty days after date hereof.

[fol. 21] Section 15 of Local Law No. 20 1934, as amended, provides in part as follows:

"Any person failing to file a return or to pay over any tax to the Comptroller within the time required by this Local Law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the

first month after such return was required to be filed or such tax became due * * *."

In the event of your failure to make application for a hearing within the time specified or to remit the tax assessed, the penalties as provided for in Section 15 hereinabove will become operative.

If you agree with the determination of your tax liability as stated above please remit the amount due together with this notice or a copy thereof, within thirty days after the date hereof.

Yours very truly, Milton Solomon, Deputy Comptroller.

[fol. 22]

Schedule 1
Misc.
J. G. Train & R. Kritzik, Accts.

Berwind-White Coal Mining Co.
1 Broadway
New York, N. Y.

Item 1 of Return

	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Receipts from Sales				
Amount as Reported	None	None	None	None
Add: Receipts from Sales Not Reported (Note)	$2077257.92	$2066195.16	$1913077.82	$2829797.39
Amount as Adjusted	$2077257.92	$2066195.16	$1913077.82	$2829797.39

Note: These amounts represent receipts from sales of tangible personal property in the City of New York, as determined from an audit of the taxpayer's records.

Schedule 2

Item 4 of Return

	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Value of Property Purchased Without Tax Used by you or in your business				
Amount as Reported	None	None	None	None
Amount as determined by Audit (Note)	$126.91	$226.04	$142.16	———
Amount as adjusted	$126.91	$226.04	$142.16	———

Note: These amounts represent purchases of tangible personal property used for consumption, and upon which no tax had heretofore been charged.

[fol. 23]

Schedule 3
Misc.
J. G. Train & R. Kritzik, Accts.

Berwind-White Coal Mining Co.
1 Broadway
New York, N. Y.

Item 11 of Return	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Sales for Purpose of Resale				
Amount as Reported	None	None	None	None
Amount Allowed (Note)	$143205.71	$103443.94	$85677.54	$255289.87
Amount as adjusted	$143205.71	$103443.94	$85677.54	$255289.87

Note: These amounts represent receipts from sales of tangible personal property in the City of New York, which were sold for the purpose of resale, and for which the taxpayer presented proper resale certificate.

Schedule 4

Item 15	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Receipts from sales delivered outside the City of New York				
Amount as reported	0	0	0	0
Add: (Note)	$151638.98	$192048.22	$133862.04	$232669.94
Amount as adjusted	$151638.98	$192048.22	$133862.04	$232669.94

Note: These items represent sales made to customers where delivery was made to points without the City of New York, and was determined by an audit of records of taxpayer.

[fol. 24]

Schedule 5

Item 20	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Other deductions permitted by the law or regulations				
Amount as reported	0	0	0	0
Add: (Note)	$5,180.26	$5,365.25	$21,207.91	$2,818.46
Amount as adjusted	$5,180.26	$5,365.25	$21,207.91	$2,818.46

Note: These amounts represent charges made to customers for non-taxable items, as determined by an audit of the records of taxpayer, and consist of the following:

Period	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Lighterage	$1,496.67	$536.13	$17.06	$.....
Interest Charges	511.89	761.60	693.47	821.84
Demurrage	.....	3,928.06	20,458.23	1,920.12
Telephone and Rent	3,171.70	139.46	39.15	76.50
	$5,180.26	$5,365.25	$21,207.91	$2,818.46

[fol. 25]

EXHIBIT "A"

The City of New York—Department of Finance—Emergency Revenue Division
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Berwind-White Coal Mining Co.
Address: 1 Broadway, New York, N. Y.

Registration No. Misc.
Local Law No. 20 of 1934, as amended
Period Audited 12/10/34—12/31/35
Accountant J. G. Train & R. Kritzik

*Indicates Deduction

Item No.		Total	Period Audited 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No.
A	Tax Due the City of New York as reported (Item 10 of return)		None	None	None	None	
B	Add—Tax—Two per centum of additional taxable receipts (Exhibit "C")		$35,547.20	$35,311.28	$33,449.45	$46,780.38	
C							
D	Total tax (Items A to C inclusive)		$35,547.20	$35,311.28	$33,449.45	$46,780.38	
E	Amount of tax—Two per centum of total receipts as adjusted (Exhibit B)	$ xxx	$35,547.20	$35,311.28	$33,449.45	$46,780.38	
F	Tax due the City of New York (Item D or E, whichever is greater)						
G	Amount of Tax Paid	—0—	—0—	—0—	—0—	—0—	
H	Balance of Tax unpaid (Item F minus Item G)	$151,088.31	$35,547.20	$35,311.28	$33,449.45	$46,780.38	
			(16%)	(13%)	(10%)	(6%)	
I	Add: Penalties to March 15, 1936	16,429.79	5,687.55	4,590.47	3,344.95	2,806.82	
J	Total Tax due the City of New York (Item H plus Item I)	$167,518.10	$41,234.75	$39,901.75	$36,794.40	$49,587.20	

City of New York—Department of Finance—Emergency
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Berwind-White Coal Mining Co.
Address: 1 Broadway, N. Y. C.

Registration No. Misc.
Local Law No. 20 of 1934, as amended
Period Audited 12/10/34—12/31/35
Accountant J. G. Train & R. Kritzik

•Indicates Deduction

Item No.	Receipts from Sales and Services as Adjusted	Period 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No.
1	Receipts from Sales (Not included in Items 2 or 3)	$2,077,257.92	$2,066,195.16	$1,913,077.82	$2,829,797.39	1
2	Receipts from installment sales					
3	Receipts from sales and Services of gas, electricity, refrigeration, etc.					
4	Value of property purchased without tax used by you or in your business	126.91	226.04	142.16	—0—	2
5	Total receipts (Items 1 to 4 inclusive)	$2,077,384.83	$2,066,421.20	$1,913,219.98	$2,829,797.39	
	Less: Allowable Deductions (Items 11 to 20 incl.)					
11	Receipts from sales for purpose of resale	$ 143,205.71	$ 103,443.94	$ 85,677.54	$ 255,289.87	3
12	Receipts from sales of food products					
13	Receipts from sales of food in restaurants where the charge per patron is less than $1.00					
14	Receipts from sales to Federal, State and Municipal agencies	151,638.98	192,048.22	133,862.04	232,669.94	4
15	Receipts from sales delivered outside the City					
16	Receipts from sales to Semi-public institutions					
17	Cash Discounts taken at time of sale and Trade Discounts					
18	Credits allowed on property accepted in part payment and intended for resale					
19	Credits allowed on property returned, cancelled sales and defective merchandise					
20	Other allowable deductions permitted by the law or regulations	5,180.26	5,365.25	21,207.91	2,818.46	5
21	Total Allowable Deductions (Items 11 to 20 incl.)	$ 300,024.95	$ 300,857.41	$ 240,747.49	$ 490,778.27	
	Total Taxable Receipts as Adjusted (Item 5 minus 21)	$1,777,359.88	$1,765,563.79	$1,672,472.49	$2,339,019.12	

See Exhibit A for Computation of Tax. Item Numbers correspond with item numbers on return.

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EXHIBIT "C"

City of New York—Department of Finance—Emergency
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Berwind-White Coal Mining Co.
Address: 1 Broadway, N. Y. C.

Registration No. Misc.
Local Law No. 20 of 1934, as amended
Period Audited 12/10/34—12/31/35
Accountant J. G. Train & R. Kritzik

*Indicates Deduction

Item No.	Summary of Additional Taxable Receipts	Period 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No
	Add—Taxable Receipts not Reported:					
1	Receipts from sales	$2,077,257.92	$2,066,195.16	$1,913,077.82	$2,829,797.39	
2	Receipts from installment sales					
3	Receipts from sales and services of gas, electricity, refrigeration, etc.					
4	Value of property purchased without tax used by you or in your business	126.91	226.04	142.16	—0—	
5	Total taxable receipts not reported (Items 1 to 4 inclusive)	$2,077,384.83	$2,066,421.20	$1,913,219.98	$2,829,797.39	
	Add—Deductions Disallowed:					
11	Receipts from sales for purpose of resale	*143,205.71	*103,443.94	*85,677.54	*255,289.87	
12	Receipts from sales of food products					
13	Receipts from sales of food in restaurants where the charge per patron is less than $1.00					
14	Receipts from sales to Federal, State and Municipal agencies	*151,638.98	*192,048.22	*133,862.04	*232,669.94	
15	Receipts from sales delivered outside the City					
16	Receipts from sales to Semi-public institutions					
17	Cash Discounts taken at time of sale and Trade Discounts					
18	Credits allowed on property accepted in part payment and intended for resale					
19	Credits allowed on property returned, cancelled sales and defective merchandise					
20	Other deductions permitted by the law or regulations	*5,180.26	*5,365.25	*21,207.91	*2,818.46	
21	Total Deductions Disallowed (Items 11 to 20 incl.)	*$ 300,024.95	*$ 300,857.41	*$ 240,747.49	*$ 490,778.27	
	Total Additional Taxable Receipts (Item 5 plus 21)	$1,777,359.88	$1,765,562.79	$1,672,472.49	$2,339,019.12	

See Exhibit A for Computation of Tax. Item numbers correspond with item numbers on return

[fol. 28] EXHIBIT II

May 13, 1936.

Hon. Frank J. Taylor, Comptroller of the City of New York, Department of Finance, Emergency Revenue Division, 50 Lafayette Street, New York, N. Y.

Dear Mr. Comptroller:

We acknowledge receipt of your letter dated April 25, 1936, notifying us that you have determined that there is due and payable by us to the City of New York a deficiency in tax (including interest and penalties) of $167,518.10 for the period from December 10, 1934 to December 31, 1935, pursuant to Local Law No. 20 of 1934, as amended.

We have had no opportunity for a hearing before you with respect to the above mentioned determination. We maintain that there are no taxes, interest or penalties due and payable to New York City by us for any period under Local Law No. 20 of 1934, as amended.

Pursuant to Section 7 of Local Law No. 20 of 1934, as amended, we hereby make application for a hearing before you with respect to the determination disclosed by your letter of April 25th, in order that we may present at such hearing the facts and the grounds upon which we maintain that there are no taxes, interest or penalties due and payable by us to the City of New York under the said law.

Yours very truly, The Berwind-White Coal Mining Co., O. M. Hinton, Vice President and Comptroller.

[fol. 29] EXHIBIT III

Frank J. Taylor
Comptroller
Milton Solomon
Deputy Comptroller
Local Law # 20 of 1934,
as amended.
Misc.

WOrth 2-4780

(Seal)

The City of New York—Department of Finance

Emergency Revenue Division—50 Lafayette Street, New York City

July 1, 1937

Name: Berwind-White Coal Mining Co.
Address: 1 Broadway, New York City
Registration No. Misc.

	Tax Deficiency Period Ended	Principal	Penalties	Total
Davis, Polk, Wardwell, Gardiner & Reed, Esqs. 15 Broad Street New York City	2/28/35	$ 32332 84	10023 18	42356 02
	5/31/35	31941 74	8943 69	40885 43
	8/31/35	30198 22	7549 56	37747 78
	12/31/35	47025 12	9875 28	56900 40
	Total:—	$141497 92	36391 71	177889 63

GENTLEMEN:

Hearings having been held in this office on April 20th, May 6th and May 21st, 1937 in connection with your tax liability to the City of New York for the period from December 10, 1934 to December 31, 1935 pursuant to Section 7 of Local Law No. 20 of 1934, as amended, the Comptroller hereby gives notice that as a result of said hearings the assessment heretofore made is increased to $177,889.63, as shown in detail on the schedule hereto attached. This determination is final and irrevocable.

[fol. 30] In the event of your failure to pay the amount of the tax due, the Comptroller will issue a warrant in accordance with Section 8 of Local Law No. 20 of 1934 as, amended.

Payment of the amount due must be made within thirty days from the date hereof and this letter, or a copy thereof, should accompany your remittance.

Very truly yours, (Sgd.) Milton Solomon, Deputy Comptroller. SH:AS Enc.

[fol. 31] EXHIBIT III, ATTACHED SCHEDULE

Berwind-White Coal Mining Co.
1 Broadway
New York City
Final Determination

	12/10/34-2/28/35	3/1/35-5/31/35	6/1/35-8/31/35	9/1/35-12/31/35
Additional taxable receipts per assessment	$1777359 88	1705563 79	1672472 49	2339019 12
Less:				
Sales credits due to changes in freight rates:				
Interborough Rapid Transit Co.	$ 4137 15	233 50	12537 88	12237 30
New England S. S. Co	4046 30	63 50		
United Electric Light & Power		4545 66		
Allowance for taxes paid by taxpayer's customer:				
Williamsburg Power Plant Corp	152534 59	163634 26	150023 82	
Total Allowances	$ 160718 04	168476 92	162561 70	*12237 30
Adjusted taxable receipts	$1616641 84	1597086 87	1509910 79	2351256 42
2% of taxable sales	32332 84	31941 74	30198 22	47025 12
Penalties to June 15, 1937 (31%)	10023 18	(28) 8943 69	(25) 7549 56	(21) 9875 28
Total Tax & Penalties Due	$ 42356 02	40885 43	37747 78	56900 40

*Italics denote red.

[fol. 32]

EXHIBIT IV

WOrth 2-4780

Frank J. Taylor
Comptroller
Milton Solomon
Deputy Comptroller
Local Law #20 of 1934,
as amended.
Misc.

The City of New York

Department of Finance

Emergency Revenue Division
50 Lafayette Street, New York City

July 1, 1937

Name: Berwind-White Coal Mining Co.
Address: 1 Broadway, New York City
Registration No. Misc.

	Tax Deficiency Period Ended	Principal	Penalties	Total
Davis, Polk, Wardwell, Gardiner & Reed, Esqs. 15 Broad Street New York City	2/28/35	$ 32332.84	10023.18	42356.02
	5/31/35	31941.74	8943.69	40885.43
	8/31/35	30198.22	7549.56	37747.78
	12/31/35	46045.17	9669.49	55714.66
	Total:—	$140517.97	36185.92	176703.89

GENTLEMEN:

Hearings having been held in this office on April 20th, May 6th and May 21, 1937 in connection with your tax liability to the City of New York for the period from December 10, 1934 to December 31, 1935 pursuant to Section 7 of Local Law No. 20 of 1934, as amended, the Comptroller hereby gives notice that as a result of said hearings the assessment heretofore made is increased to $176,703.89, as shown in detail on the schedule hereto attached. This determination is final and irrevocable.

In the event of your failure to pay the amount of the tax due, the Comptroller will issue a warrant in accordance with Section 8 of Local Law No. 20 of 1934, as amended.

Payment of the amount due must be made within thirty days from the date hereof and this letter, or a copy thereof, should accompany your remittance.

Very truly yours, (Sgd.) Milton Solomon, Deputy Comptroller. SH:ts Enc.

[fol 33] EXHIBIT IV, ATTACHED SCHEDULE

Berwind-White Coal Mining Co.
1 Broadway
New York City

Final Determination

	12/10/34–2/28/35	3/1/35–5/31/35	6/1/35–8/31/35	9/1/35–12/31/35
Additional taxable receipts per assessment	$1777359.88	1765563.79	1672472.49	2339019.12
Less:				
Sales credits due to changes in freight rates:				
Interborough Rapid Transit Co	4137.15	233.50	12537.88	12237.30
New England S. S. Co	4046.30	63.50		
United Electric Light & Power		4545.66		
Allowance for taxes paid by taxpayer's customer:				
Williamsburg Power Plant Corp	152534.59	163634.26	150023.82	48997.97
Total Allowances	$ 160718.04	168476.92	162561.70	36760.67
Adjusted taxable receipts	$1616641.84	1597086.87	1509910.79	2302258.45
2% of taxable sales	32332.84	31941.74	30198.22	46045.17
Penalties to June 15, 1937 (51%)	10023.18	(28) 8943.69	(25) 7549.56	(21) 9669.49
	$ 42356.02	40885.43	37747.78	55714.66

* Italics denote red.

[fol 34] EXHIBIT V.

July 19, 1937.

Hon. Frank J. Taylor, Comptroller of the City of New York, Department of Finance, Emergency Revenue Division, 50 Lafayette Street, New York, N. Y.

Attention of Mr. Sol Herman

DEAR SIR:

Pursuant to the demand made in your letter dated July 1, 1937 for payment of the sum of $176,703.89 representing tax and penalties determined by you to be due under Local Law No. 20 of 1934, as amended, for the period from December 10, 1934 to December 31, 1935, from the undersigned, we hand you herewith our check in the amount of $176,703.89 as a deposit pursuant to Section 7 of Local Law

No. 20 of 1934, as amended, of the tax and penalties determined by you to be due.

You are advised that this deposit is not made voluntarily, but is made under protest and duress in order to avoid the assessment of further penalties, the issuance of a warrant as threatened in your letter of July 1, 1937, and in order to perfect our right to have your determination reviewed by an order of certiorari, pursuant to the above mentioned local law.

We enclose a copy of your letter of July 1, 1937 giving notice of your determination of the above mentioned tax.

Very truly yours, the Berwind-White Coal Mining Co. (signed) O. M. Hinton, Vice President and Comptroller.

[fol. 35] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Title omitted]

RETURN TO ORDER OF CERTIORARI

To the Supreme Court of the State of New York:

Frank J. Taylor, Comptroller of the City of New York, does hereby certify and make this return to an order of certiorari granted herein by Hon. Edward J. McGoldrick, a Justice of this Court, on the 22nd day of July, 1937, consisting of all and singular his ruling and assessment in the premises, with his proceedings, decisions, determinations and actions in the premises, and all and singular the evidence, documents, records and other papers before him or which were submitted to him relative to his determination of tax, pursuant to New York City Local Law No. 20 [fol. 36] of 1934, as amended, against The Berwind-White Coal Mining Company:

1. Determination of the Comptroller of April 25, 1936, together with annexed exhibits, determinating tax deficiency due from petitioner under Local Law No. 20 of 1934, as amended, for the period from December 10, 1934 to December 31, 1935.

2. Letter dated May 13, 1936 from petitioner to Hon. Frank J. Taylor, Comptroller, requesting a hearing on said tax assessment.

3. Minutes of testimony of hearing held April 20, 1937, May 6, 1937 and May 21, 1937 at 50 Lafayette Street, Borough of Manhattan, City of New York, including the exhibits therein referred to.

4. Determination of the Comptroller of the City of New York, dated July 1, 1937, determining tax deficiency due from petitioner under Local Law No. 20 of 1934, as amended, for the period from December 10, 1934 to December 31, 1935 in the sum of $177,889.63.

5. Subsequent determination of the Comptroller of the City of New York, dated July 1, 1937, reducing determination of deficiency tax due from petitioner under Local Law No. 20 of 1934, as amended, for the period December 10, 1934 to December 31, 1935, to the sum of $176,703.89.

6. Letter from petitioner to the Comptroller of the City of New York, dated July 19, 1937, transmitting check in the sum of $176,703.89.

This return is based upon the records, proceedings and papers on file in the office of the Comptroller of the City of New York.

[fol. 37] On information and belief respondent denies so much of the allegations set forth in paragraphs "Fourth" and "Sixth" of the petition as allege that the contracts referred to contemplate or require that delivery be made from petitioner's mines in Pennsylvania, and denies each and every other allegation set forth in said paragraphs of the petition except as and to the extent that the same may be admitted by this return.

On information and belief, respondent denies so much of paragraph "Seventh" of the petition as alleges that said contracts required delivery of the coal from mines in Pennsylvania; denies so much thereof as alleges that deliveries were completed at Harsimus Pier Jersey City, New Jersey; and respondent denies each and every other allegation contained in said paragraph except to the extent that the same may be admitted by this return.

On information and belief, respondent denies so much of paragraph "Eighth" of the petition as alleges that the contracts required delivery at the mines and so much thereof as alleges that said contracts were completed by delivery at petitioner's mines; and respondent denies each and

every other allegation contained in said paragraph except to the extent that the same may be admitted by this return.

On information and belief, respondent denies the allegations set forth in paragraph "Nineteenth" of the petition.

Respondent denies any knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraph "Twelfth" of the petition, except that the respondent admits that petitioner did not currently report [fol. 38] or pay the tax upon the receipts mentioned.

On information and belief, respondent denies the allegations set forth in paragraph "Eighteenth" of the petition, except to the extent that they may be admitted by this return.

Respondent denies each and every allegation set forth in paragraph "Twentieth" of the petition, except so much thereof as alleges that the Comptroller's determination may be reviewed by certiorari and that no previous application for such an order was made.

Respondent admits the allegations set forth in paragraph "Twenty-first" of the petition.

On information and belief, respondent denies all other allegations contained in the petition herein, except as the same and to the extent that they may have been admitted by this return.

In witness whereof, the Comptroller of the City of New York has hereunto set his hand this 18th day of August, 1937.

Frank J. Taylor, Comptroller of the City of New York.

DOCUMENTS ANNEXED TO RESPONDENT'S RETURN TO ORDER OF CERTIORARI

[fol. 39]

Document 1, Annexed to Return

This document is printed as Exhibit I annexed to Petition at page 20 hereof.

Document 2, Annexed to Return

This document is printed as Exhibit II annexed to Petition at page 28 hereof.

[fol. 40] DOCUMENT 3, ANNEXD TO RETURN

In the Matter of BERWIND-WHITE COAL MINING Co.

Review of Deficiency Assessment made pursuant to Local Law No. 20 of 1934, as amended for the period from December 10, 1934, to December 31, 1935, for the principal sum of $151,088.31, plus penalties and/or interest of $16,429.79, total $167,518.10.

No. 50 Lafayette Street, New York, N. Y.

April 20, 1937—10:30 A. M.

Before: Sol Herman, Esq., Presiding for the Comptroller

Appearances:

Morton Baum, Esq., Assistant Corporation Counsel, In behalf of the Comptroller.

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Attorneys for Petitioner. Marvin Lyons, Esq., of Counsel.

COLLOQUY

Mr. Herman: This is a hearing to review a deficiency assessment made against the Berwind-White Coal Mining Co. pursuant to Local Law No. 20 of 1934, as amended, for the period from December 10, 1934, to December 31, 1935, for the principal sum of $151,088.31 plus penalties and/or interest of $16,429.79, total of $167,518.10.

[fol. 41] Mr. Lyons: I offer in evidence power of attorney authorizing me to represent Berwind-White Coal Mining Company.

(Received and marked Taxpayer's Exhibit 1.)

I offer in evidence the deficiency notice dated April 25, 1936, to the Berwind-White Coal Mining Company. Will you accept a copy of that?

Mr. Herman: Yes.

(Received and marked Taxpayer's Exhibit 2.)

the period from December 31, 1934, to December 31, 1935, Berwind-White Coal Mining Company dated May 13, 1936, requesting a formal hearing.

(Received and marked Taxpayer's Exhibit 3.)

I offer in evidence a statement showing a summary of sales to customers by Berwind-White Coal Mining Company

in connection with whom taxpayer has been assessed for the period from December 10, 1934, to December 31, 1935.

Mr. Herman: I suggest you offer that for identification and then have the person who prepared it identify it.

Mr. Lyons: I thought you agreed these figures were correct and we would not have any question about that.

Mr. Herman: For the purpose of the record I would like you to have someone who prepared it identify it.

(Marked Taxpayer's Exhibit 4 for Identification.)

CHARLES E. DUNLAP, 102 East 73rd Street, New York City, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Mr. Dunlap, are you the president of The Berwind-White Coal Mining Company?

A. I am.

[fol. 42] Q. Where was that company organized?

A. In Pennsylvania.

Q. In what year, about, was it organized?

A. Incorporated in 1888.

Q. Where is the main office of the company?

A. Philadelphia, Pennsylvania.

Q. What office does that company have in New York?

A. Sales office in New York, at 1 Broadway.

Q. How long have you been associated with the company?

A. Since 1914.

Q. Were you the president of the company in 1934-1935?

A. I was.

Q. What is the business of the company?

A. The mining, producing and marketing of coal.

Q. How does the business differ from the business of a dealer in coal?

A. We sell our coal directly to the consumer or the buyer, and we mine and sell the coal that we produce.

Q. You don't buy coal for re-sale?

A. We do not.

Q. That isn't your business?

A. No.

Q. Does the company own coal mines?

A. Yes.

Q. Where are those mines located?

A. Somerset County, Pennsylvania.

Q. Has your company ever owned coal mines in the State of New York?

A. No.

Q. Are there any coal mines in the state of New York?

A. To my knowledge, no.

Q. Are those mines owned by the company located in Pennsylvania?

A. Yes.

Q. Do those mines owned by the company cover any particular seams or veins of coal?

A. They do; Miller B seam and C-prime.

Q. Is the coal extracted from the B seam a different quality from the coal extracted from the C prime seam?

A. It is.

Q. Will you compare the physical, chemical and burning qualities of the two classes of coal?

[fol. 43] A. B coal is a superior coal as to burning quality. It is higher in fixed carbon and lower in volatile matter. Lower in ash, than the C-prime coal.

Q. How long has your company owned mines covering the B and C prime seams?

A. Approximately forty years.

Q. Does the coal produced from the B seam have a trade name?

A. Berwind's Eureka.

Q. Sometimes referred to as Berwind's Standard Eureka?

A. Sometimes.

Q. And Berwind's Standard Eureka B seam coal?

A. B seam coal for the trade.

Q. The correct name is Berwind's Eureka?

A. Berwind's Eureka.

Q. How long has the B seam coal borne that trade name?

A. Approximately as long as we have been operating the mines, about 40 years.

Q. How is the coal produced in the C-prime seam different from Berwind's Eureka as to designation?

A. It is known as Berwind's Standard C-prime coal.

Q. Are the mines in Pennsylvania which you have referred to covering the B seam, the only source of Berwind's Eureka coal?

A. They are.

Q. Are the mines in Pennsylvania covering the C-prime seam the only source of Berwind's Standard C-prime coal?

A. They are.

Q. What classes of customers in New York City has it been the practice of your company to sell coal to?

A. Public utilities, steamship companies, industrial plants and wholesalers.

Q. That is, dealers who buy for re-sale?

A. Yes.

Q. What type of coal has it been the practice of your company to sell to the utility companies?

A. Berwind's Eureka.

[fol. 44] Q. What type of coal has it been the practice of your company to sell to steamship companies?

A. Berwind's Eureka.

Q. To whom, to what class of customers has it been your practice to sell Berwind's Standard C-prime coal?

A. To small industrial plants and to dealers.

Q. Approximately what is the annual tonnage of coal sold to customers in New York City?

A. About 1,300,000 gross tons.

Q. Is that to all customers?

A. Approximately, yes.

Q. App-oximately how much of that tonnage is Berwind's Eureka coal?

A. About a million two. I would like to amend that statement. I think I could be more accurate. To all classes of customers it is about 1,500,000 gross tons.

Q. And how much of that is Berwind's Eureka?

A. About a million three hundred thousand.

Q. And the balance is C-prime coal?

A. Yes.

Q. About how much of the Eureka coal is sold to utility companies?

A. About a million one hundred thousand tons.

Q. Were those figures you gave us approximately the figures representing the sales in 1934 and 1935?

A. I think they are, yes.

Q. What use is made of the coal by the customers who fall into the classification of public utilities?

A. It is for the purpose of making steam.

Q. And what use for the steamship companies?

A. Same purpose.

Q. Has your company represented to the utility companies and the steamship companies, and has it been the practice of your company to represent that Berwind's Eureka Coal is well adapted to produce steam in their plants and steamships?

A. Yes, sir.

[fol. 45] Q. Has your company from time to time made tests in the purchasers' plants for the purpose of showing to such customers that Berwind's Eureka coal is suitable for their needs?

A. It has. In many cases they require tests to be made before they contract.

Q. Is that particularly true in the case of the utility companies?

A. Yes.

Q. Has it been your practice to advise your customers that Berwind's Eureka coal comes only from your mines covering the B seam in Pennsylvania?

A. Yes.

Q. Has the company ever had any coal yards, warehouses, or other facilities for the storage of coal in New York State?

A. It has not.

Q. Will you explain why the company has never had any such facilities?

A. The conditions and character of our business do not require it, as we make deliveries direct to customers from our mines via the Pennsylvania Railroad and barges and tugboats to destination. They have the storage facilities necessary to protect their coal supply.

Q. What facilities does your company have for the delivery of coal sold to purchasers in New York City?

A. Barges, tugboats, water borne delivery from Jersey City.

Q. Do you own railroad cars?

A. We do.

Q. What are those cars used for?

A. To carry coal from our mines in Pennsylvania to Jersey City, Harsimus Pier.

Q. How long have you had those delivery facilities you described?

A. Approximately 40 years.

Q. What has been the method of the company in making deliveries of coal to purchasers in New York City?

A. During that period it was loaded at our mines in Pennsylvania on railroad cars, shipped via the Pennsylvania Railroad to Harsimus Pier in Jersey City, loaded into [fol. 46] our barges and taken by our tugboats alongside the plants of our customers.

Q. Or the steamships?

A. Or the steamships. Our customers include steamship companies.

Q. During 1934 and 1935 and the years prior to that do you know whether any producer or seller of coal in the New York City market had similar facilities for delivery that your company had?

A. I think not.

Q. Why does your company maintain the facilities for delivery that you described?

A. In order to assure the public utilities and large consumers of coal in New York a steady flow of coal from the mines to the consumers. Protect them against shortages and delays, etc.

Q. Has it been the practice of the company to represent to your customers in New York City that it has the facilities which you have described for the delivery of coal from the mines to their plants and steamships?

A. Yes.

Q. In 1934 and 1935, did you negotiate and complete the making of contracts for the sale of coal to the following:

Interborough Rapid Transit Company
Brooklyn Edison Company
New York Edison Company
United Electric Light & Power Company
Williamsburgh Power Plant Corporation
New England Steamship Company?

A. Yes.

Q. For how many years prior to the making of such contracts had Berwind-White been selling coal to each of these companies?

A. To the Interborough Rapid Transit Company, approximately 30 years, 35 years.

[fol. 47] Q. During all these years was the coal sold to each of these companies Berwind's Eureka coal?

A. It was.

Q. During all those years was the coal delivered to each of those customers coal actually mined from the B seam in Pennsylvania?

A. It was.

Q. And during all those years was the coal so mined transported from the mines over the Pennsylvania Railroad in your company's cars to Harsimus Pier in Jersey City, and then shipped by barge to the customers' plants?

A. It was.

Q. Was it ever the practice of your company to make deliveries in any other manner?

A. No.

Q. Has your company ever purchased coal from dealers in New York State for the purpose of sale to any of its customers in New York City?

A. No.

Q. Did you receive an invitation to bid from the Receivers of the Interborough Rapid Transit Company in February, 1934?

A. Yes.

Q. I show you this document and ask you whether that is the invitation to bid?

A. It is.

Mr. Lyons: If I may, I would like to introduce copies in substitution for these originals, because they are the records of the company.

Mr. Herman: That is all right.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 5.)

Q. Did you submit a bid in respect to that invitation?

A. I did.

[fol. 48] Q. Is that the bid?

A. That is the bid.

Mr. Lyons: Would you like to look at the originals of these (handing to Mr. Herman)?

Mr. Baum: Is the copy conformed?

Mr. Lyons: Yes, I offer that in evidence.

Mr. Herman: No objection.

(Received and marked Taxpayer's Exhibit 6.)

Q. This bid states that the coal is to be Berwind's Eureka. Is that the coal produced from the B seam which you have described?

A. That is correct.

Q. It also states "Delivery conditions similar to last year." What does that mean?

A. That means that the conditions under which we have been delivering our coal, namely, delivered, shipped from our mines in our own railway cars to Harsimus Pier, Jersey City, put into our barges and delivered alongside plant.

Q. The bid also states, and I quote this, "This coal is transported from our mines to New York entirely over the Pennsylvania Railroad—shipping point being Windber, Pa." Does that state the complete route to the plant or merely the route on which the coal traveled by rail?

A. Only the route that the coal traveled by rail.

Q. Then that is an incomplete statement?

A. Yes.

Q. Was your bid accepted?

A. It was.

Q. Is this the letter from the Interborough Rapid Transit Co. accepting the bid (handing)?

A. That is it.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 7.)

[fol. 49] Q. Following the acceptance of that bid, was a formal contract executed?

A. It was.

Q. Dated April 1st, 1934, covering the period April 1, 1934 to March 31, 1395. I show you that document. Is that the contract?

A. Correct.

Q. You signed that contract, did you?

A. I did.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 8.)

Mr. Lyons: Let the record show that it has been agreed that all these documents that have been offered in evidence, copies of them have been accepted in lieu of the original.

Mr. Herman: So agreed.

Q. In January, 1935, did you submit a bid to the Receivers of the Interborough Rapid Transit Company with respect to its coal requirements for the period, annual period beginning April 1, 1935?

A. I did.

Q. Is that the bid you submitted (handing)?

A. That is it.

Q. Was that bid accepted?

A. Yes.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 9.)

Q. Was that bid accepted.

A. It was.

Mr. Lyons: I offer that acceptance in evidence.

(Received and marked Taxpayer's Exhibit 10.)

[fol. 50] Q. Following the acceptance of that bid, did you make that contract (handing)?

A. I did.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 11.)

Q. In negotiating these contracts, Mr. Dunlap, did you follow the practice that you have testified to of making representations to the Interborough as to the source, quality and delivery practice that would be followed with respect to the coal covered by those contracts?

A. I did.

Q. The subject matter of these contracts, Exhibits 8 and 11, is stated to be "Interborough's Standard A coal," and the contracts state certain specifications as to carbon, volatile matter, ash, etc. Does Berwind's Eureka coal meet those requirements?

A. It must.

Q. Was that coal required to be delivered under these contracts?

A. It was.

Q. Did your company produce from its mines in Pennsylvania the required quantities of Berwind's Eureka coal and deliver such coal alongside the plants of the Interborough Rapid Transit Company, and were all those deliveries

made by shipment over the Pennsylvania Railroad from the mines to Harsimus Pier in Jersey City, and from there by barge to the respective plants of the Interborough?

A. That is correct.

Q. These contracts provide that the price is based upon present railroad rates and should there be any change in such rates during the life of the contract, the price is to be increased or decreased accordingly.

Mr. Baum: I don't want to interrupt, but do not the contracts speak for themselves?

[fol. 51] Mr. Lyons: I am describing a provision of the contract and I am going to ask Mr. Dunlap a question with respect to that which requires some explanation.

(Discussion not recorded.)

Mr. Baum: The contract itself doesn't say anything about it. The contract contains the very best evidence and the only evidence is the contract itself. How can the parties vary the terms of a written instrument?

Mr. Lyons: We can ask what they understand the terms to mean.

Mr. Baum: And if the parties get together and say it means something else.

Mr. Lyons: Their own construction of the contract.

Mr. Baum: I am going to object formally to any questions relating to terms of the contract because the contract is the best evidence between the parties and speaks for itself. The Court and this tribunal will make a reasonable interpretation of the terms of the contract. Anything else is surplus and has no bearing and has no weight. You have offered the contracts. Now if there is material that is not in the contract which you think ought to be brought out, negotiations prior or subsequent.

Mr. Lyons: I am perfectly willing to withdraw the question we asked as to what coal is required to be delivered under the contract.

Mr. Baum: There is nothing in the contract about Eureka coal. This second Interborough contract. Your question assumed it was in the contract. Wouldn't the best thing be to let the contract speak?

[fol. 52] Mr. Lyons: There are certain provisions in them I would like to have the witness who signed the contract explain. I think we are entitled to explain certain provisions that might not be clear.

Mr. Herman: Well, why don't you ask a question and if you wish to object, make your objection and it will be sustained or overruled.

Mr. Baum: In the hearings before the Comptroller, the practice is always to give the Taxpayer a great deal of leeway. The strict rules of evidence are not adhered to. That is why I hesitated to interrupt Mr. Lyons in the presentation of his case, but where something comes in that will tend to vary a written instrument that has been submitted, we really should not receive any evidence in that regard.

Mr. Lyons: I don't want to ask him to vary the document at all.

Mr. Baum: Let me ask him one question.

Mr. Lyons: When I asked him what railroad rates were meant I am not trying to vary the document, I am trying to explain the term railroad rates.

Mr. Baum: Well, just one question on preliminary cross-examination of Mr. Dunlap. Does this contract contain all the rights, agreements and obligations of the parties thereunder?

The Witness: I should assume so, yes, it does.

Mr. Baum: Well, then, I don't see that there is anything else that can be offered but the contract itself.

(Discussion not recorded.)

[fol. 53] Mr. Lyons: It refers to railroad rates and it refers to mines. I think we are entitled to bring out what railroad rates and what mines were meant.

Mr. Baum: Will you indicate what section and page you are referring to on that.

Mr. Lyons: Take page 2-a of this contract, the first contract, April, 1934. That provides, in paragraph 1, "The seller reserves the right to incur obligations for the sale of coal from its mines during all periods when deliveries required under outstanding obligations, plus requirements for Seller's coke ovens, do not in the aggregate exceed the physical capacity of said mines." I want to ask him what that means.

Mr. Baum: That is to say, what mines he had in mind.

Mr. Lyons: Then I will ask the other party to the contract what mines he meant by that provision.

Mr. Baum: That is the very point. The parties said "mines." It doesn't make any difference what mines they

said, so far as they were concerned. It was good enough for them to write it into the contract.

Mr. Herman: Let's get the question and object to the specific question.

By Mr. Lyons:

Q. These contracts provide that the price is based upon certain railroad rates and should there be any change in such rates during the life of the contract the price is to be increased or decreased accordingly. To what railroad rates does that refer?

Mr. Baum: Where does that refer to?

Mr. Lyons: Paragraph 6, page 4.

[fol. 54] Mr. Baum: I object to that. I don't see that it has any material bearing on this case. It might be any railroad or any method of shipment that the Taxpayer could make.

Mr. Lyons: Our position is that this contract contemplated shipments from the seller's mines.

Mr. Herman: Objection sustained.

Mr. Lyons: Exception. Let the record show that I offer to prove that the rates referred to in the contracts were the rates covering shipments from the mines of the company over the Pennsylvania Railroad to Harsimus Pier, Jersey City.

By Mr. Lyons:

Q. These contracts provide that "the Seller reserves the right to incur obligations for the sale of coal from its mines during all periods when deliveries required under outstanding obligations, plus requirements for Seller's coke ovens, do not in the aggregate exceed the physical capacity of said mines." To what mines does that refer?

A. The mines in Somerset County, Pennsylvania.

Q. The contracts provide that "In the event of contingencies or causes restricting the production or shipment from the Seller's mines, the Buyer shall be entitled to receive hereunder in any one month only that proportion of the tonnage herein contracted as actual total shipments in available coal car equipment bear to (a) rated capacity of said mines or to (b) physical capacity of said mines in case rated capacity shall have been reduced by contingencies or causes

of the character herein referred to." To what mines does that refer to?

[fol. 55] Mr. Baum: That is objected to as varying the terms of this contract by oral statements that form an inherent part of the contract if they were intended by the parties to be a part of the contract.

Mr. Herman: Objection sustained.

Mr. Lyons: Exception. I offer to prove that the mines referred to in that provision were the mines of Berwind-White Coal Mining Company in Pennsylvania.

By Mr. Lyons:

Q. These contracts further provide that the Seller agrees to "pro rate available facilities for delivery among all of its customers so affected, including Buyer, in proportion to the amount of coal that each is entitled to receive." To what delivery facilities does that refer?

A. To our railway cars and our barges and tugboats.

Q. Did you sign a contract with the New York Edison Company on or about February 7, 1934?

A. I did.

Q. Is that the contract (handing)?

A. It is.

Mr. Lyons: I offer that in evidence.

Mr. Baum: I presume you want to ask the same type questions in regard to all the contracts regarding delivery with regard to particular railroads or particular mine?

Mr. Lyons: Not necessarily. Some contracts state it. We have certain questions to ask with respect to each of these contracts, more or less, with respect to the me ning of certain provisions of the contract.

(Received and marked Taxpayer's Exhibit 12.)

[fol. 56] Q. Did you sign a contract with the New York Edison Company dated January 4, 1935?

A. I did.

Q. Is that the contract (handing)?

A. It is.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 13.)

Q. Did you sign a contract with the New York Edison Company dated January 4, 1935, covering the period June 17, 1935, to March 31, 1936?

A. I did.

Q. Is that the contract?

A. It is.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 14.)

Q. Did you sign a contract with the United Electric Light & Power Company dated January 4, 1935, covering the period April 1, 1935, to June 16, 1935?

A. I did.

Q. Is that the contract?

A. It is.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 15.)

Q. Did you sign a contract with the United Electric Light & Power Company dated January 4, 1935, covering the period June 17, 1935, to March 31, 1936?

A. Yes.

Q. Is that the contract?

A. Yes.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 16.)

[fol. 57] Q. In negotiating these contracts, Mr. Dunlap, did you follow the practice that you have testified to of making representations to these customers as to the source, quality and delivery practice that would be followed with respect to the coal covered by these contracts?

A. Yes.

Q. Pursuant to the contracts with New York Edison Company and United Electric Light & Power Company which have just been introduced in evidence, did your company produce from its mines the required amounts of coal and deliver such coal alongside the plants of New York Edison and United Electric Light & Power Companies during 1934 and 1935?

Mr. Baum: That is objected to. It doesn't make a hoot of a difference what they did. The agreement is the thing

that is going to control the obligations and rights of these parties.

Mr. Lyons: We are entitled to show what they did under the contract.

Mr. Baum: I will withdraw that objection.

A. We did.

Q. And were all those deliveries made by shipment over the Pennsylvania Railroad from the mines of the company to Harsimus Pier in Jersey City and from there by barge to the respective plants of those two companies?

A. Yes.

Q. Mr. Dunlap, the contract dated February 7, 1934, between Berwind-White and New York Edison Company covers 220,000 gross tons of Standard Eureka run of mine and 180,000 gross tons of 2-inch nut and slack B seam [fol. 58] bituminous coal from the seller's mines in Cambria and Somerset counties, Pennsylvania.

Mr. Baum: What exhibit is that?

Mr. Lyons: That is Exhibit 12. Let the record show that is Exhibit 12.

Q. (Continuing) Will you explain, Mr. Dunlap, the difference between the two types of coal referred to there—Standard Eureka and 2-inch nut and slack B seam bituminous coal?

A. The same character from the same seam, but the 2-inch nut and slack is all coal that passes through a 2-inch screen.

Q. Are they produced from the same mines?

A. Exactly.

Q. All these contracts provided for reduction of price "if at any time during the period of this contract the Seller shall sell any coal of the same grade as that to be delivered hereunder from the mines at a price less than that specified herein." To what mines does that refer?

Mr. Baum: That is objected to on the same grounds as heretofore given.

Mr. Herman: Objection sustained.

Mr. Lyons: Exception. I offer to prove that the mines referred to are the mines of the company in Pennsylvania.

Q. These contracts contain a provision that the prices stated therein are based "on the present rate of wages paid

to miners and day laborers at the above mine or mines of the Seller and upon the present railroad freight rates from these mines to New York tidewater." Will you explain what is meant by "railroad freight rates from the mines to New York tidewater"?

[fol. 59] Mr. Herman: That is the same type of question that was asked previously that was objected to before.

Mr. Baum: Same objection. There is a general objection to all these questions along that line, as to whether we are going to interpret the contract.

Mr. Lyons: Same exception. I offer to prove that the freight rates referred to are the rates from the mines over the Pennsylvania Railroad to Harsimus Pier, Jersey City, and from there by barge to the buyer's plant. Rates fixed by the Interstate Commerce Commission.

Q. Mr. Dunlap, at the time you signed all these contracts, did you own any mines anywhere, except in central Pennsylvania?

A. In West Virginia; ownership.

Q. Did the company own any such mines?

A. No.

Mr. Baum: What did you mean by saying you had mines in West Virginia?

The Witness: There are certain mines in West Virginia that we are sales agent for. I did not quite understand what he meant by ownership.

Q. Did the Berwind-White Coal Mining Company sell any coal produced from the mines in West Virginia to the consumers in New York City during 1934 and 1935?

A. To my knowledge, no.

Q. I will ask you another question. Berwind's Eureka coal, is that coal produced anywhere except in the mines in Pennsylvania?

A. No.

Q. On or about February 6, 1934, did you sign a contract with the Brooklyn Edison Company?

A. Yes.

[fol. 60] Q. Is this the contract (handing)?

A. It is.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 17.)

Q. On or about January 3, 1935, did you sign a contract with Brooklyn Edison Company?

A. I did.

Q. Is that the contract (handing)?

A. Yes.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 18.)

Q. Mr. Dunlap, in negotiating these contracts with the Brooklyn Edison Company, did you follow the practice of making representations to the Brooklyn Edison Company as to the source, the quality and delivery practice that would be followed with respect to this coal?

A. I did.

Q. Pursuant to those contracts did your company produce from its mines in Pennsylvania the required quantities of coal and deliver such coal over the Pennsylvania Railroad to Harsimus Pier and from there by barge alongside the plants of the Brooklyn Edison Company during 1934 and 1935?

A. They did.

Q. These contracts cover Berwind's Standard Eureka run of mine coal from the Eureka mines in Cambria and Somerset counties at or near Windber, Pennsylvania. And those mines cover the B seam to which you testified?

A. Yes.

Q. The contracts also contain a provision that the price is based upon present wages and freight rates. Will you explain what wages and freight rates are referred to?

A. The wages paid to the miners and the freight rates [fol. 61] from Windber, Pennsylvania, over the Pennsylvania Railroad to Harsimus Pier, Jersey City.

Q. On or about May 26, 1934, did you execute a contract with Williamsburgh Power Plant Corporation?

A. Yes.

Q. Is that a copy of the contract (handing)?

A. It is.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 19.)

Q. On or about January 5, 1935, did you execute a contract with Williamsburgh Power Plant Corporation?

A. Yes.

Q. Is that the contract (handing)?
A. It is.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 20.)

Q. In negotiating these contracts introduced as Exhibits 19 and 20, did you follow the practice that you have testified to, of making representations to the Williamsburgh Power Plant Corporation as to the source, the quality and delivery practice that would be followed with respect to this specific coal?
A. I did.
Q. Pursuant to those contracts, did your company produce from its mines in Pennsylvania the required quantities of coal and deliver such coal alongside the plant of Williamsburgh Power Plant Corporation during 1934 and 1935?
A. They did.
Q. Were all deliveries made by shipment over the Pennsylvania Railroad from the mines to Harsimus Pier, Jersey City, and from there by barge to the plant of that company?
A. They were.
[fol. 62] Q. These contracts refer to a railroad freight rate of $2.72 per gross ton and provide for a change in price corresponding to a change in freight rate. Is the freight rate referred to the rate for shipment over the Pennsylvania Railroad to Harsimus Pier for trans-shipment by water?
A. It is.

By Mr. Baum:

Q. Did you ever use any other road to make shipments?
A. No.
Q. You used the Pennsylvania Railroad?
A. Pennsylvania Railroad entirely.
Q. Could you use the Lehigh Valley?
A. No.
Q. Could you use the D. L. & W.?
A. No.
Q. Could you use the Erie?
A. No.
Q. Can you use any other road?
A. The only railroad that comes into our mines, that is available to us, is the Pennsylvania Railroad.

Q. Can you use the Lehigh Valley?
A. No.

Mr. Baum: All right.
Mr. Lyons: Thank you.

By Mr. Lyons:

Q. The subject matter of these contracts is Berwind's Standard Eureka run of mine B seam coal from the seller's mines located in Cambria and Somerset counties, Pennsylvania, and the mines are specified as Eureka Nos. 35, 36, 40, 42 and Maryland Shaft Mine owned and operated by the Berwind-White Coal Mining Company. Are those the mines covering the B seam to which you have referred?
A. Yes.
Q. During the years 1934 and 1935, was any coal delivered by your company from any point in the State of [fol. 63] New York to any of the utility companies to which we have referred?
A. No.
Q. At the time you entered into these contracts covering 1934 and 1935, were there any dealers within the city or state of New York, from whom your company could secure Berwind's Standard Eureka coal in sufficient quantities to meet the requirements of any or all of these companies?
A. No.
Q. On or about March 6, 1934, did you sign a contract with New England Steamship Company of New Haven?
A. Yes.
Q. Is that the contract (handing)?
A. Yes.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 21.)

Q. This contract covers the period from April 1, 1934, to March 31, 1935. During that period were all deliveries of coal made to New England Steamship Company made pursuant to and in accordance with the terms of that contract?
A. They were.
Q. What kind of coal was delivered under that contract?
A. Berwind's Eureka.
Q. Was the coal delivered under that contract delivered by shipment from the mines?

A. It was.
Q. What mines?
A. Mines in Somerset County.

Mr. Lyons: That is all. Do you want to cross-examine.
Mr. Baum: Are you through with your exhibits?
Mr. Lyons: Through with Mr. Dunlap. We have other witnesses to call.
Mr. Baum: I will have to read all these things through to see what there is to question, so suppose you continue [fol. 64] with your case and we will call Mr. Dunlap again, because we will have to meet again.
Mr. Lyons. I was thinking we might relieve Mr. Dunlap. He has been called in several of the purchaser cases. He is president of the company and a very busy man, and these are the only exhibits that we are introducing through him. I would consider it a great help.
Mr. Baum: I can't grasp all of these exhibits as fast as all that. I don't profess to know that much. We will fix a time that is convenient to Mr. Dunlap.
Mr. Lyons: I am sorry, Mr. Dunlap. We will have to call you again.

FREDERICK D. SEYMOUR, Lake Road, Short Hills, New Jersey, after first having been duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Are you, Mr. Seymour, the general sales manager of the Berwind-White Coal Mining Company?
A. I am.
Q. How long have you been connected with that company?
A. Since 1930.
Q. Are all the sales made by the company made pursuant to spot contracts or term contracts?
A. They are.
Q. Will you explain what is meant by spot contracts and term contracts?
A. Spot is an order to be filled within a few days and does not contain all the provisions of a term contract, which extends over a period of time—generally over one year—and

[fol. 65] provides for increase or decrease in price on account of wages, and other provisions.

Q. As sales manager of the Berwind-White Coal Mining Company, did you participate in the negotiation of the spot or term contracts for the sale of coal in 1934 and 1935 to the following customers:

Interborough Rapid Transit Company,
New York Edison Company,
United Electric Light & Power Company,
Brooklyn Edison Company,
Williamsburgh Power Plant Corporation,
New England Steamship Company,
Arbuckle Brothers,
Caddell Drydock & Repair Company,
L. A. Dreyfus Company?

A. To some extent in all of them.

Q. In the course of those negotiations, were the purchasers informed as to the quality of Berwind's Eureka coal and Berwind's C-prime coal?

A. They were.

Q. Which of those customers purchased Berwind's C-prime coal?

A. I think the only one you mentioned is Arbuckle Brothers.

Q. Well, the contract covering the Dreyfus Company, I believe, calls for C-prime coal.

A. It does, but none has been delivered.

Q. You mean it calls for C-prime coal or Berwind's Eureka coal, and you deliver Berwind's Eureka?

A. That is correct.

Q. Now, you testified that the only one of these enumerated customers that purchased C-prime coal was Arbuckle Brothers. But all the others purchased Berwind's Eureka?

A. With the exception of the Dreyfus Company, which could purchase C-prime coal. Aside from that, Arbuckle Brothers had a contract for C-prime coal.

[fol. 66] Q. What kind of coal was delivered to Dreyfus?

A. Eureka.

Q. Were those customers who took Eureka coal informed of the fact that the only source from which the company got that coal was from the mines in Pennsylvania? That is, the mines covering the B seam?

A. That is correct.

Q. Were those customers who took the C-prime coal, or that customer, informed that the only source from which the company obtained its coal was from its mines in Pennsylvania covering the C-prime seam?

A. That is correct.

Q. What facilities for delivery from the mines to the consumers does your company have?

A. We have our own cars, which are hauled over the Pennsylvania Railroad; our own barges and tugboats for hauling the barges to New York City.

Q. From what point?

A. From Jersey City. Harsimus Pier.

Q. What advantage does Berwind-White have over other producers with respect to its delivery facilities covering deliveries to New York City customers?

Mr. Baum: That is objected to. What has that got to do with the case, the advantages they have over other producers? We object to that question on the ground of relevancy.

Mr. Lyons: The point is, I want to bring out that Berwind-White has delivery facilities which are particularly adapted to having a constant stream of coal coming in from the mines to the consumers, and that is a very important point to the consumers in making contracts for the purchase of coal from the Berwind-White Company. I want to ask Mr. Seymour what advantage his company has over other companies.

[fol. 67] Mr. Baum: All right, objection withdrawn.

A. Our company owns its own coal cars, and its own barges, and tugs, which allow it—which allow the company—complete control of the shipment from the mine to a consumer in New York Harbor having coal delivered alongside.

Q. Do you know whether any other producer and seller of coal with the same market has the same facilities?

A. To my knowledge, there are no other coal suppliers who own their own facilities.

Q. Were those purchasers which we have mentioned informed prior to the making of their contracts covering deliveries in 1934 and 1935 that those deliveries would be made to them by Berwind-White directly from its mines to their plants?

A. That is right.

Q. Is it your practice to emphasize your facilities for delivery with respect to deliveries of coal?

Mr. Baum: That is objected to. This man is a salesman. He can make any statement but what would that have to do in the selling of coal so far as the actual rights and liabilities of the parties under the contract are concerned? He can promise the world and do you want to prove what is done by what a salesman promises to a customer?

Mr. Lyons: I can connect that up by testimony of the purchasers, as to what points they had in mind in making these contracts.

Mr. Baum: You want to tie up his promise with the hope and anticipation of the purchaser, but no legal rights that may vary the terms of a written instrument?

Mr. Lyons: No, no. We are trying to establish that the practice represents a course of dealing——

[fol. 68] Mr. Baum: Let's see how he deals with these people, but what difference does it make what he tells these people.

Mr. Lyons: I don't care about that question. I will withdraw it.

By Mr. Lyons:

Q. Were any sales of coal made to Arbuckle Brothers by your company between December 10, 1934, and December 31, 1934?

A. Not to my knowledge.

Q. Did you negotiate and sign a contract on or about December 10, 1934, covering deliveries of coal for the calendar year 1935 with Arbuckle Brothers?

A. I did.

Q. Is this the contract (handing)?

A. Yes.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 22.)

(Recess)

Mr. Lyons: Mr. Seymour wants to correct a statement he made with respect to sales of C-prime coal.

The Witness: I believe I am incorrect on the Dreyfus, whereas the contract is written for both Eureka and C-prime coal the deliveries were actually made in C-prime.

Q. So that you delivered C-prime during this period to both Dreyfus and Arbuckle Brothers?

A. Yes.

Q. In negotiating that contract, Mr. Seymour, did you follow the practice that you have testified to, in informing the company, the purchaser, as to the source, the quality and delivery practice to be followed with respect to the coal [fol. 69] covered by the contract?

A. That is correct. I would like to insert there that some of my salesmen also took part.

Q. But you are the general sales manager and you had supervision of those sales?

A. That is right.

Q. And Arbuckle Brothers was informed that the coal was Berwind's C-prime to be shipped from the mines in Pennsylvania to the plant of Arbuckle Brothers over the Pennsylvania Railroad to Harsimus Pier and then by barge to the plant?

A. That is correct.

Q. Had you sold coal to Arbuckle Brothers in prior years?

A. Yes.

Q. Approximately how long?

A. I would say one or two years.

Q. During those years, was the coal delivered to Arbuckle Brothers in accordance with that same delivery practice that you testified to?

A. Yes.

Q. The contract provides, under the heading "Kind and Grade of Coal," Berwind's C-prime ¾ inch slack from Mine No. 37 and/or No. 40 at the option of the seller subject to the approval of the buyer. Where are those mines, Nos. 37 and 40, located?

A. Somerset County, Pennsylvania.

Q. How were the deliveries of coal made under this contract?

A. Made by dumping coal at the mines into the railroad cars, transporting it over the Pennsylvania Railroad to Harsimus Pier, Jersey City, dumping the coal from the cars

into our barges and towing it and dumping it alongside the Arbuckle Brothers plant.

Q. Did you negotiate and sign a contract on or about June 30, 1934, with L. A. Dreyfus Company for the sale of coal covering the period August 1, 1934, to July 31, 1935?

A. That is right.

[fol. 70] Q. Is this the contract (handing)?

A. That is the contract.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 23.)

Q. On or about July 29, 1935, did you negotiate and sign a contract with L. A. Dreyfus covering the period August 1, 1935, to July 31, 1936?

A. I did.

Q. Is that the contract (handing)?

A. That is the contract.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 24.)

Q. In negotiating those two Dreyfus contracts, did you follow the practice that you have testified to of informing the Dreyfus Company as to the source, the quality and delivery practice to be followed with respect to the coal covered by the contracts?

A. In the case of Dreyfus, that practice has been of such long standing that it was not necessary, and the coal was bought on that basis. Practically no negotiations were held in regard to that contract other than past experience.

Q. How long have you sold coal to Dreyfus?

A. To my knowledge, since 1930, when I came with the company, and for many years before that.

Q. During those years was the coal delivered to the Dreyfus Company in accordance with the regular practice which you have described?

A. That is correct.

Q. And how was the coal delivered under these two contracts? Was it in the same way it was delivered to Arbuckle Brothers?

A. That is correct.

[fol. 71] Q. Did you make sales of coal to Caddell Drydock & Repair Company during the period from December 10, 1934, to December 31, 1935?

A. That is correct.

Q. How long have you been selling coal to them?

A. To my knowledge since 1930 and many years before.

Q. Will you describe the manner in which you obtained orders for coal from Caddell Drydock & Repair Company and their requirements with respect to quality, source and delivery?

A. Those orders are received by telephone and entered as an order by us without any correspondence and based entirely on past practice and experience.

Q. What were the requirements of those orders with respect to quality?

A. Eureka coal.

Q. Source?

A. From Pennsylvania.

Q. Your mines?

A. In Somerset County.

Q. What about delivery?

A. By barge as in the case of Arbuckle Brothers.

Q. Did you make deliveries pursuant to those requirements?

A. Deliveries were made pursuant to those requirements.

Q. In the same way?

A. Same manner as Arbuckle and Dreyfus.

Q. Did you negotiate sales of coal to the New England Steamship Company during the period March 31, 1935, to December 31, 1935?

A. Yes.

Q. Will you state how those sales were made?

A. Those sales were made as a continuation of the contract expiring March 31.

Q. 1935?

A. 1935, on a spot basis, with no contract, inasmuch as I recall that there was a dispute on the price. The price was accepted subject to change without notice and shipments were continued in the same manner as the previous contract.

[fol. 72] Q. In other words, the terms of these spot orders were precisely the same as the written contract that expired on March 31, 1935?

A. That was understood between the parties.

Q. Same as to deliveries and source?

A. Yes.

Q. But different as to price?

A. I believe the price continued, but I would not want to say.

Mr. Herman: What do you mean by spot orders?

The Witness: A sale is made at a price under the prevailing conditions. No other conditions applied, such as wage increase and change in freight rate, and it is for immediate shipment.

By Mr. Lyons:

Q. The usual manner of receiving a spot order, is that over the telephone?

A. Sometimes over the telephone, sometimes confirmed in writing.

Q. Did you negotiate sales of coal to Austin, Nichols & Company for the period December 10, 1934, to December 31, 1935?

A. I did through salesmen.

Q. Were those sales spot sales?

A. Spot sales.

Q. What kind of coal was required by those spot orders?

A. C-prime coal.

Q. What was the requirement of those orders with respect to the source of the coal?

A. Delivered from our mines in Somerset County, Pennsylvania.

Q. I show you this document and ask you whether that is an order that you received from Austin, Nichols & Company during the period?

A. That is an order received during the period in question.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 25.)

[fol. 73] Q. I notice that that order states the terms as F. O. B. delivered mine 30. What does that mean?

A. That means that the price and delivery took place F. O. B. the mine, free on board cars at the mine, the buyer paying the freight to destination.

Q. In other words, your delivery pursuant to this order was complete upon delivering the coal on board the cars at the mine?

A. That is correct.

Mr. Baum: Is that your general practice?

The Witness: It is a general practice where the coal is not for trans-shipment, in New York Harbor, in the City of New York.

Mr. Baum: Where the coal is for trans-shipment in the City of New York, that is not the practice, is it?

The Witness: No, except in very small quantities, such as one car load.

By Mr. Lyons:

Q. Do you make F. O. B. mine deliveries——

A. (interrupting) Let me just finish that answer again. In some cases a plant location is such that they canno 'ake it by barge, only by railroad car. That also has a bearing.

Q. Did you make deliveries F. O. B. mine to any other customers, in New York City, to any other consumers, in New York City, during this period?

A. I believe not. It is an unusual delivery in the City of New York.

Q. And not in accordance with your general practice?

A. It is not.

Q. I show you a carbon copy of a letter addressed to Austin, Nichols & Company, dated December 27, 1934, and [fol. 74] ask you whether that is an acceptance of the order from Austin, Nichols & Company, in evidence as Exhibit 25?

A. It is.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 26.)

Q. Were all other deliveries to Austin, Nichols & Company made pursuant to the same type of spot orders during the period?

A. That is right.

Q. Were all deliveries to Austin, Nichols & Company in this period at the mines?

A. All deliveries were made F. O. B. the mines.

Q. And in all cases the source of the coal was the mines in Pennsylvania?

A. That is correct.

Q. During the period December 10, 1934, to December 31, 1935, were any deliveries of coal made to any of your customers from any point within the State of New York?

A. No.

Q. Has it ever been the practice of your company to make deliveries of coal to New York City customers from any point in the State of New York?

A. No.

Q. Were any deliveries pursuant to spot contracts made during the period December 10, 1934, to December 31, 1935, to customers with whom the company had term contracts?

A. I did not get the question.

Q. The customers who had term contracts, did they receive delivery pursuant to those contracts?

A. Yes.

Q. And while they had term contracts did they ever receive any deliveries pursuant to spot orders?

A. No.

Q. And the deliveries made to customers pursuant to spot orders; conversely, were not made to those customers while there were any term contracts in existence?

A. That is right.

Mr. Lyons: All right, Mr. Seymour.

[fol. 75] Frank E. Ward, of 45 Christopher Street, New York, N. Y., after first having been duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Mr. Ward, are you an auditor employed by Berwind-White Coal Mining Company?

A. Yes.

Q. I show you this statement which has been marked for identification as Exhibit 4, and ask you whether you prepared that statement from the records of the company?

A. I did.

Mr. Lyons: I offer this in evidence as Exhibit 4, as a statement of the correct figures representing sales by Berwind-White to those customers in connection with whom sales tax has been assessed for the period from December 10, 1934, to December 31, 1935.

Mr. Herman: It is stipulated that the statement which the Taxpayer has offered in evidence contains the correct figures for the purposes of this hearing.

(Taxpayer's Exhibit 4 for Identification marked in evidence.)

GEORGE MCCREE, of 142 Manor Avenue, Hempstead, N. Y., after first having been duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. What is your position with the Berwind-White Coal Mining Company?

A. Assistant manager of the bunkering department.

Q. How long have you been associated with the company?

A. Since May, 1933.

[fol. 76] Q. Are you charged with the negotiation of contracts for the sale of coal to steamship companies?

A. Yes.

Q. In 1934 and 1935 did you negotiate contracts on behalf of the Berwind-White Coal Mining Company with the following customers:

All-America Cables,
Clyde-Mallory Lines,
French Line,
International Mercantile Marine Company,
New York & Porto Rico Steamship Company,
North Atlantic & Gulf Steamship Company,
Ocean Dominion Steamship Corporation,
Spanish Line.
U. S. Navigation Company, and
Pioneer Terminal Corporation?

A. Yes.

Q. Were all sales during this period made pursuant to either a spot or term contract?

A. Yes; one or the other.

Q. Which sales were made pursuant to spot contracts?

A. The U. S. Navigation Company is one, and North Atlantic and Gulf Steamship Company and Pioneer Terminal Corporation are probably spot sales.

Q. And the others were pursuant to contracts?

A. Term contracts.

Q. What kind of coal has it been the practice of the company to sell to these steamship companies?

A. They have always specified for Berwind's Standard Eureka Coal,—that is what we term it in the bunkering department.

Q. And that coal is used by the steamship companies for producing steam?

A. Yes, that is what they use it for.

Q. Had your company sold coal to these purchasers prior to 1934?

A. Yes.

[fol. 77] Q. Has it been your practice in negotiating contracts for the sale of coal with these customers to make representations to them with respect to the quality, source and Berwind-White facilities for delivery of the coal to consumers in New York Harbor?

A. Yes.

Q. What representations was it your practice to make?

Mr. Baum: I object to that question.

Mr. Lyons: I am asking him the question with respect to the course of dealing of the company over a long period of years in connection with the same customers, and I submit that I am entitled to show a course of dealing in connection with the issue of interstate commerce.

Mr. Baum: But you are asking him what he says to the customer as to the quality of the coal and that sort of thing. How can that be binding on us? Is it any better than the testimony given by the last witness as to how it helps to sell the coal?

Mr. Lyons: Well, we are entitled to show what the purchasers rely on in making these contracts.

Mr. Baum: The fact that he made any statement does not prove anything at all that these people relied on it.

Mr. Lyons: Well, we are calling the customers later. We cannot call them all at the same time. But we are entitled to show what passes by way of information between buyer and seller.

Mr. Baum: I think this is immaterial, but make no formal objection.

[fol. 78] A. We represent the coal to be Berwind Standard Eureka, and inform them where it is produced, the class of coal that it is, the seam it is produced from.

Q. What is that?

A. The Miller or the B seam in Pennsylvania. We find that buyers are very well informed as to the different kinds of coal in those fields, and it behooves us to tell them what our properties are and where they are and what our facili-

ties are—we have our own cars and we have our own barges and tugs.

Q. What do you use those cars and barges for?

A. For transporting the Standard Eureka coal to the Harsimus Pier.

Q. From where?

A. From the Eureka mines in Somerset County, Windber, Pennsylvania.

Q. And what do you use the barges for?

A. We dump the coal that comes in the cars into the barges and have the barges towed alongside steamships.

Q. How long have you been selling coal to these companies that were mentioned above?

A. Personally I have been doing it for four years for Berwind-White Coal Mining Company, and prior to that many of these companies are on record as being contractors for a great number of years.

Q. Did you participate in the negotiating of the contracts covering the calendar year 1934 and 1935 with All-America Cables?

A. Yes.

Q. I show you this contract dated November 25, 1933, and ask whether you signed that contract?

A. Yes.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 27.)

Q. I show you document dated December 3, 1934, purporting to be a contract between All-America Cables and Ber- [fol. 79] wind-White Coal Mining Company, and ask you whether you signed that contract?

A. Yes.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 28.)

Mr. Lyons: Will you stipulate to accept the contracts with the Clyde-Mallory Lines, French Line, International Mercantile Marine, New York & Porto Rico Steamship Company and Spanish Line in evidence?

Mr. Herman: Yes.

(Received and marked Taxpayer's Exhibits 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38, respectively.)

Q. Mr. McCree, these contracts are all in the same form, are they not?

A. Yes.

Q. Will you describe your practice with respect to making the deliveries of coal to customers under these contracts just introduced in evidence?

A. When we conclude a term contract, we are very watchful of the steamers that belong to the contracting party. We draw it to their attention that we notice that the steamers will be in the port of New York at such and such a time, and ask them if they require any deliveries of coal under those contracts.

Q. Those contracts are all "requirements" contracts?

A. Yes, they are all "requirement" term contracts. They invariably tell us what their requirements are, and we make arrangements to make delivery in accordance with their requirements. We put the orders through in the usual manner, through the marine department up to the mines at Windber. They ship the coal onto the cars at Pennsylvania [fol. 80] Railroad to Harsimus pier and dump it into the barges and deliver alongside their ship at the time they want it.

Q. All these contracts provide for an adjustment in the event of a change in railway rates or in wages. To what railway rates and wages does this provision refer?

A. That refers to the railroad rates in existence under the Interstate Commerce Commission between the mines in Windber and the Harsimus Pier.

Q. In Jersey City?

A. Yes.

Q. And what wages are referred to?

A. The wages referred to are the miners' wages at the mines at Windber.

Q. Were all deliveries made pursuant to these contracts that are in evidence, during the period December 10, 1934, to December 31, 1935?

A. They were.

Q. How were they made?

A. In the usual manner that I have described.

Q. Will you state it again?

A. We keep in touch with them——

Q. (Interrupting.) Never mind; that is on the record. Did you participate in the negotiation of spot contracts with the U. S. Navigation Company, Pioneer Terminal Cor-

poration and North Atlantic & Gulf Steamship Company during the period December 10, 1934 and December 31, 1935?

A. Yes.

Q. Will you state how those spot contracts were made and fulfilled?

A. Usually orally. We solicit them, represent our coal to them, and they usually place their order when we represent to them what we have to sell and the price.

Q. What are the requirements of those orders with respect to quality, source and delivery of the coal?

A. We inform them we have our Eureka coal for sale and [fol. 81] we can deliver it alongside to suit their requirements and then they place their order on that basis for the price and for method of delivery on our representation that it is Eureka coal.

Q. And your representations with respect to delivery cover the general practice that you have described?

A. Yes.

Q. Is all the coal delivered to these spot customers delivered in the manner you have described?

A. Yes.

Q. Did you participate in the negotiation of the contract with Ocean Dominion Steamship Corporation dated March 5, 1934?

A. Yes.

Q. That contract is signed by A. Cory Davies. Will you state whether that is his signature?

A. Yes.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 39.)

Q. This contract provides, among other things, that "At the other U. S. ports mentioned we agree to purchase our requirements from you insofar as quality, price and conditions can be met by you." The "other U. S. ports mentioned" does that include New York Harbor?

A. Yes.

Q. Will you explain what is meant by "requirements covering quality, price and conditions"?

A. They know that we have Berwind's Eureka in our own barges by our representations.

Q. What is meant by conditions?

A. They know our conditions will be in our own barges, and minimum of 250 tons. That is our usual method of de-

livery. Where they want smaller quantities and lower price, they have the option of purchasing at a lower price from other people who can give that method of delivery that we don't undertake.

[fol. 82] Q. What do you mean by method of delivery?

A. They can take it over alongside the pier in the lower bay of New York.

Q. Will you state what coal was delivered under this contract?

A. Whenever they have taken supplies from us, it has been Berwind's Eureka delivered alongside their steamer in our barges.

Q. At what point?

A. From our mines the coal came in cars to Harsimus, dumped into barges and towed alongside their ships.

Q. Was this contract abrogated or modified in any way prior to December 31, 1935?

A. No.

Mr. Lyons: That is all.

LEROY A. FRENCH, 852 Valley Road, Montclair, N. J., after first having been duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Are you the Marine Superintendent of Berwind-White Coal Mining Company?

A. I am.

Q. How long have you been associated with the company?

A. Since 1921.

Q. How long have you been Marine Superintendent?

A. Since 1930.

Q. As Marine Superintendent did you have charge in 1934 and 1935 and prior years of making the deliveries of coal to the customers of Berwind-White in New York City?

A. I did.

Q. Do you know what customers of Berwind-White are involved in this City sales tax matter?

A. Yes.

Q. Do you know what facilities for the receipt of coal each of those customers had in 1934 and 1935?

A. I do.

[fol. 83] Q. Take the utilities?

A. All the utilities, on account of the physical location of the plants, are along the water front, on deep water.

Q. How are their plants constructed with respect to the receipt of coal?

A. Only for water borne delivery.

Q. Will you describe the plant structure covering the receipt of coal?

A. Practically all the bunkers for the power houses in New York City are above the ground level some 3 to 7 stories high. It is taken from the barges by derricks and diggers and it is then hoisted up and dumped into a hopper and by belt conveyors into the bunkers. That is to assure gravity feed.

Q. And that part of the plant is on the water front?

A. All on the water front. There is no means for taking coal in any place except by the water side.

Q. Would you say that it was possible to receive coal in a steady stream into those plants in any way except by barge?

A. Not in the quantities they use.

Q. That covers the utilities. What about the steamship companies?

A. All the steamship companies are on the water, naturally.

Q. You deliver alongside the steamer?

A. Alongside the steamer, placed on board by the same method, little derricks and buckets hoisted and dumped into the bunkers. It is impossible to deliver to a steamer from the dock side.

Q. And the industrial companies that receive coal?

A. All the industrial companies are along the water front. That is the only way to get coal to them. Most of these small plants have no railroad spurs or anything else connected with them.

Q. What about Austin, Nichols?

A. I would not know about Austin, Nichols.

[fol. 84] Q. Approximately how many tons a week did you deliver to the Interborough Rapid Transit Company during 1934 and 1935?

A. Approximately 8,000 tons per week.

Q. What about New York Edison Company?

A. Approximately 8,000 tons per week.

Q. That includes United Electric Light & Power Company?

A. That includes the Hell Gate plant and the 40th Street plant.

Q. Brooklyn Edison?

A. About 9,000 tons a week.

Q. Williamsburgh Power Plant Corporation?

A. Approximately 2,000 tons a week.

Q. Has it been your experience that the utility companies require a constant stream of deliveries of coal?

A. Yes.

Q. According to the testimony you gave before, the total weekly tonnage delivered to the utility companies apart from the other customers runs between 25,000 and 30,000 tons a week in 1934 and 1935?

A. That is correct.

Q. Will you state how you received notice of the delivery requirements of the utility companies in 1934 and 1935?

A. That has been by telephone every Thursday from the utilities, under the terms of the contract, and we compile the total number of tons converted into cars.

Q. Tons required for what?

A. For the various utilities.

Q. For what period?

A. For the following week; and it is transmitted to the mines.

Q. Is any coal mined except upon order?

A. No.

Q. Will you describe the manner in which notice of the requirements of the steamship companies was given to you in 1934 and 1935?

A. We generally watch them, all the steamship companies wanting a large amount of coal, taking 3,000 to 4,000 tons [fol. 85] of coal. Their schedule is projected and we have a copy of their schedule, so we watch the approximate time the steamer will be in from the other side, and we order the coal to be here three or four days before the steamer is to be here.

Mr. Baum: And that coal is a stream from the mines the way the utility coal is?

The Witness: No, that is a block of coal ordered especially for that purpose.

Mr. Baum: The stream is only for the utilities.

The Witness: That is right.

Q. You say that no coal is mined except on order; that is true of the steamship companies as well as of the utility companies?

A. That is right.

Q. Will you describe the procedure that is followed for delivering coal from the mines after the orders have been received there?

A. The coal is shipped from Windber.

Mr. Baum: The witness stated that the order was not received at the mine, the order is received in New York City.

Mr. Lyons: Well, it is transmitted to the mine.

Mr. Baum: That is, you say you transmit the order to the mine?

The Witness: Yes.

Mr. Baum: As far as the customer is concerned, he puts the order in here in New York. The contract is made in New York.

The Witness: Well, I can say on what I am speaking about, he doesn't, it comes from Hoboken.

[fol. 86] By Mr. Lyons:

Q. Well, let's not argue about that, Mr. French. The contract is made in New York?

A. The contract is made in New York.

Q. Will you describe the procedure for delivering coal from the mines after the orders have been transmitted by you?

A. The coal is shipped from Windber to South Fork by Pennsylvania Railroad, and from there to the Juniata scales, just outside of Altoona, where the coal is weighed, and a complete history of the car is made on a railroad bill of lading. From that point the coal is shipped to Harsimus Pier in Jersey City.

Q. How much time do you allow between the time you communicate the orders to the mines and the time you deliver the coal to Harsimus Pier?

A. About 7 days.

Q. What in your experience is the average time that the cars are in transit from the mines to Harsimus Pier?

A. Approximately 5 days.

Q. Why do you allow the additional 2 days?

A. For the mining of the coal.

Q. Is each car that arrives at Harsimus Pier from the mines accompanied by a way bill which designates the weight, the quality of the coal and the source of the coal?

A. It is.

Q. Is this one of the way bills that you have described (handing)?

A. It is.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 40.)

Q. This way bill states, "From Eureka Colliery 35 Pa". What does that mean?

A. The 35 means the mine it comes from, the number of the mine.

Q. And it says "Classification Davy."

A. That is our trade name for that particular mine.

[fol. 87] Q. Mine No. 35?

A. That is right.

Q. It says "B coal."

A. That means Miller B seam.

Q. Is that the Eureka coal?

A. Yes.

Q. Is that way bill identical in form with the way bill that accompanied every car of coal that arrived at Harsimus Pier from the mines from December 10, 1934, to December 31, 1935?

A. It is.

Q. And that delivery practice that you described before, was that followed in 1935 and 1934?

A. Yes, sir.

Q. What happens to the cars of coal upon their arrival at Harsimus Pier?

A. Dumped into barges.

Q. Are the barges loaded for delivery to particular customers for particular orders?

A. That is right.

Q. What happens to the barges upon their being loaded?

A. Delivered to the customer.

Q. How?

A. By tug.

Q. Is a shipping document made covering each barge shipment?

A. Yes.

Q. I show you this document and ask you whether that is a shipping document covering a shipment in 1935?

A. It is.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 41.)

Q. Were all deliveries by barge during 1934 and 1935 covered by bills of lading in substantially the same form as Exhibit 41?

A. Yes.

Q. Did a duplicate original bill of lading covering each barge shipment go to the customer for each delivery that was made in 1934 and 1935?

A. It did.

[fol. 88] Q. And did you keep the other duplicate original?

A. Yes.

Q. When the barges arrive at the plants or steamships who does the unloading?

A. The consignee.

Q. When is your delivery complete?

A. Delivered alongside.

Q. When the barge comes alongside?

A. That is right.

Mr. Lyons: That closes that.

Mr. Herman: Hearing adjourned to May 6, 1937, at 10 A. M.

Mr. Herman: This is a continuation of the hearing held April 20, 1937, to review a deficiency assessment made against the Berwind-White Coal Mining Company pursuant to Local Law 20 of 1934 as amended, for the period from December 10, 1934, to December 31, 1935, for the principal sum of $151,088.31, plus penalties and/or interest of $16,429.79, making a total of $167,518.10.

Porter C. Savage, 655 Decatur Street, Brooklyn, N. Y., a witness duly called on behalf of the taxpayer, being duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Will you state your full name?

A. Porter C. Savage.

Q. The address?

A. 655 Decatur Street, Brooklyn, residence; business address, 4 Irving Place.

Q. Mr. Savage, in 1934 and 1935 were you employed by the New York Edison Company and the United Electric [fol. 89] Light & Power Company?

A. I was.

Q. In what capacity were you so employed?

A. I was purchasing agent.

Q. And how long have you been employed by those companies?

A. Twenty-odd years.

Q. And what were your duties as purchasing agent, with respect to the purchase of coal?

A. To solicit offers of coal, to investigate those offers and to decide what coal would be purchased.

Q. You participated in the negotiation of contracts for the purchase of coal?

A. I did.

Q. What was the business of those two companies?

A. The generating and distribution and sale of electricity.

Q. And in connection with that business what use do they make of coal?

A. To generate electricity—to make steam to generate electricity.

Q. Will you designate the generator stations which the New York Edison Company had in 1934 and 1935 and prior years, stating the name and location of each station?

A. Waterside No. 1 and No. 2 stations at 38th and 39th Streets in the East River. East River station, at 14th Street and the East River.

Q. Will you designate the generating stations which the United Electric Light & Power Company had in New York?

A. Those two stations I mentioned were New York Edison Company stations.

Q. You mentioned three stations?

A. Three stations, yes; Waterside 1 and 2, and East River were New York Edison Company stations. The United Electric Light & Power Company stations were located at 132nd Street and East River and Sherman Creek at 201st Street and Harlem River.

Q. That makes five stations which you had to keep supplied with coal?

A. That is right.

[fol. 90] Q. Is Consolidated Edison Company of New York the successor of those two companies?

A. Yes.

Q. What was the date of succession, approximately?

A. August 1, 1936.

Q. Those two companies were merged into Consolidated Edison Company?

A. The United Company was merged into the New York Edison Company—wait, I am wrong—on August 1, 1936—1935—August 1, 1935. And those two companies then became the New York Edison Company, Incorporated. That company was merged with the Consolidated Gas Company of New York into the Consolidated Edison Company of New York, Incorporated on December 22, I think, 1936.

Q. And have you been employed by the Consolidated Edison Company as purchasing agent since its organization?

A. Yes.

Q. And you have the same duties?

A. Yes.

Q. Now, going back to the New York Edison Company, and United Electric Light & Power Company, did those companies conduct tests or experiments for different types of coal to determine the particular types that were adaptable for use in their plants?

A. They did.

Q. Was Berwind's Eureka coal among the brands of coal so tested?

A. It was.

Q. And what was disclosed by your tests with respect to Berwind's Eureka coal?

A. That it was a coal of excellent quality and adapted to use in any and all of our power plants.

Q. Had those companies purchased Berwind's Eureka coal from the Berwind-White Coal Company prior to 1934?

A. Yes, for many years.

Q. For approximately how long a period?

A. 25 years.

Q. And approximately what annual quantities were purchased over that period?

[fol. 91] A. Well, it varied from probably 150,000 tons annually to 400,000 tons annually.

Q. What was it in, say, between 1932 and 1935?

A. It is 400,000 tons a year, if my memory serves me correctly.

Q. And has Consolidated Edison Company continued to purchase similar quantities of Berwind's Eureka coal from the Berwind-White Coal Mining Company for use in the same plants?

A. It has.

Q. Have those companies, the predecessors and the successor, ever purchased Berwind's Eureka coal from any other source than Berwind-White?

A. No.

Q. What is the source of Berwind's Eureka coal?

Mr. Baum: Now, that is objected to. What does he know about the source of their coal? He is only interested in the coal that he purchased, he cannot tell what the source is.

By Mr. Baum:

Q. By way of cross-examination, do you go out to these mines?

A. I have been out to the mines.

Q. Do you watch them do the mining?

A. I do not.

Q. Do you supervise their loading into the cars?

A. I do not.

Q. You are at the power house of your concern?

A. I am not. I am in the general office.

Q. In the general office?

A. Yes.

Mr. Baum: Well, will you ask him your question again and see whether it is relevant?

[fol. 92] By Mr. Lyons:

Q. Isn't it one of your duties, Mr. Savage, to see the source of supply for use of your plants?

A. Source of supply, yes.

Q. You know the source of Berwind's Eureka coal?

A. I do.

Q. What is that source?

A. It is Somerset and Cambria Counties in the State of Pennsylvania.

Q. The mines are in that district?

A. The mines are in those counties.

Q. Does the quality of the coal have any particular relation to its source?

A. In that particular territory the "B" seam coal, that is, the seam from which Berwind's Eureka coal comes, is a very high grade seam coal.

Q. Would the coal from other districts in Pennsylvania be of a different quality?

A. Yes.

Q. Approximately what was the total average daily consumption of coal by the five plants that you have enumerated?

A. It is about 6,000 tons a day.

Q. Does that figure represent approximately the consumption of those plants in 1934, 1935 and the years immediately preceding those years?

A. It may have been somewhat less, perhaps 500 tons a day less, or something like that.

Q. How often do you require deliveries at the five plants you have mentioned?

A. Daily.

Q. Was that true in 1934 and 1935;

A. It was.

Q. And the years prior to that?

A. Yes.

Q. What are the reasons for requiring daily deliveries?

A. Because we have no facilities for storing coal at the plants in the quantities that the plants use the coal.

Q. And your business requires a constant supply of coal for the generation of power for use in the city?

A. I think the——

[fol. 93] Mr. Baum: He has already testified that he needs the coal to make the steam.

Witness: I think it is generally known that the company's services are imperative for the supplying of power, and the coal is what keeps the supply going.

Mr. Lyons: I agree that is obvious.

By Mr. Lyons:

Q. Do you know whether or not Berwind-White has any facilities in New York for the storage of coal?

A. To my knowledge they have not.

Q. Do you know whether any producer or seller, large producer or seller of coal, maintains facilities for the storage of coal in New York for delivery?

Mr. Baum: That is objected to. How does he know how the coal business is run in New York.

Mr. Herman: Objection sustained.

Mr. Lyons: You might permit me to say a word.

Mr. Herman: Well, it is pretty obvious.

By Mr. Baum:

Q. Are you familiar with all of the coal dealers in New York and the method by which they operate?

A. Not all of them.

Q. Well, are you able to say what their storage facilities are and where they keep their coal, or anything?

A. I am not.

Q. You are purchasing agent for the Consolidated Edison Company and you are interested in the coal that they buy, but how can you tell how these coal people run their business?

A. I think we are talking now of bituminous coal, and the [fol. 94] large producers of bituminous coal who are the people who have the coal in the quantities we would need, and I think that we meet every one of those representatives from every one of those companies, and we hear directly from them of the supply that we need.

Q. Well then, you don't know as a matter of fact—for the reason that they told you or you inferred that?

A. Well, that is the reason I know what my name is because somebody told me.

By Mr. Lyons:

Q. Well, Mr. Savage, isn't it your business to know what these large producers of coal in New York have by way of delivery facilities?

A. We make it a point to learn that from every supplier of coal and from hundreds with whom we never do business.

Q. And you do that because that is vital to your business?

A. It is imperative.

Q. Now, I will ask you again, do you know whether any large producer and seller of coal in New York City maintains facilities for the storage of coal in New York and for the delivery of coal from such storage to plants such as yours?

Mr. Herman: Just a moment, objection has been entered previously to that question and the objection was sustained, so please do not answer that question.

Mr. Lyons: I offer to prove by the testimony of Mr. Savage that large producers and sellers of coal in New York, from which the New York Edison Company and United Electric Light & Power Company purchased their coal do not maintain facilities for storage in New York.

[fol. 95] Mr. Baum: That was objected to on the ground that the company's witnesses, their testimony which is already in evidence, could have told us that fact, if asked, but that these people are not employed by the coal company and are in no position to tell how the coal company runs its business.

Mr. Lyons: The company's witnesses have already testified to that.

Mr. Baum: Then we have it in the record from the lips of the people who know.

Mr. Lyons: We have it in the record from the lips of the people who know and I seek to get it into the record again from the lips of the person whose business it is to know, and who does know.

By Mr. Baum:

Q. Would it make any difference to you if they had storage facilities in New York?

A. It would.

By Mr. Lyons:

Q. What difference would it make?

A. If the coal producers carried a supply of coal in storage available for our use in the quantities that we would need it in the city of New York, it would not be necessary for us to maintain storage facilities.

Q. Well now, is storage coal as good in quality for the purpose of use in your plants as coal that comes directly from the mines, freshly mined coal?

A. The freshly mined coal is better. Coal in storage depreciates in value in time.

Q. Then you prefer to have coal come directly from the mines?

A. Yes.

Q. And in fact you contract for coal to come directly from the mine?

A. We do.

Mr. Baum: Well now, wouldn't the contracts say what he contracts for?

[fol. 96] Mr. Lyons: They do.

Mr. Baum: Well, all right, then the contracts would speak, he doesn't have to speak.

Mr. Lyons: When I was interrupted by Mr. Baum, I meant to complete the statement of offer of proof by saying that I further offer to prove that the reasons why the large producers and sellers of coal in New York do not maintain storage facilities here are that the necessary space, which would be very large, would not be available; that the cost of maintaining such storage facilities would be prohibitive; and that storage is unnecessary, because there are facilities, and there have been in use for a great many years, facilities for delivering coal directly from the mines, and that Berwind-White Coal Mining Company does not maintain storage facilities and has never maintained storage facilities in New York City for the same reasons.

Mr. Baum: Was this a question?

Mr. Lyons: This is an offer to prove on account of your objection.

Mr. Baum: I see.

By Mr. Lyons:

Q. Will you describe the facilities for the receipt of coal at your various plants?

A. All coal received at the plants comes in either barges or steamers to alongside our stations.

Q. Well, will you describe how—what the physical structures of the plants are for receiving coal?

A. There are towers in which there is located hoisting equipment, which operates a bucket that hoists the coal from the barges or steamers into a hopper in the tower, [fol. 97] from which it is delivered by lorries or small cars to the bunkers where the coal is needed.

Q. Now, those towers, in all cases do they face the waterfront?

A. In all cases.

Q. Then in order to receive deliveries the coal must come to the plant by water?

A. The only way we can receive coal at any of our plants is by water.

Q. Is it possible to receive deliveries of coal in your plants in the quantities you require, in any other way than by water delivery?

A. It is not.

Q. Has that always been true?

A. Yes.

Q. In connection with negotiating contracts for the purchase of coal do you familiarize yourself with the delivery facilities of the sellers?

A. We do.

Q. Are you familiar with the facilities maintained by Berwind-White for delivering coal?

A. I am.

Q. Will you describe those facilities?

A. They consist of Berwind's own railroad cars, their own barges for delivering alongside of our stations, and their own tugs.

Q. And what is the practice followed by Berwind-White in delivering coal to your plant?

A. That is the practice.

Q. Well, how——

A. The coal is delivered alongside——

Q. Well, will you describe it in more detail from the time you notify them of your requirements?

A. Well, weekly we notify the Berwind office of the amount of coal we are going to need from them the following week.

By Mr. Baum:

Q. You call up the mines?

A. We call up the office in New York.

[fol. 98] Q. I see.

A. And that coal is shipped to Harsimus Pier.

By Mr. Lyons:

Q. From the mines?

A. From the mines; where it is loaded in barges and those barges are towed alongside of our stations.

Q. Has Berwind-White Coal Mining Company maintained those facilities and followed that practice of making deliveries during all the years your companies have purchased coal from it?

A. Yes.

Q. Now, with that background of experience with respect to the quality, source and delivery of Berwind's Eureka coal, did you participate in the negotiating of contracts between Berwind-White Coal Mining Company and the New York Edison Company? And between Berwind-White and United Electric Light & Power Company, in 1934, and 1935, which are in evidence as Exhibits 12, 13, 14, 15 and 16?

Q. I wanted to ask him if he participated in the negotiation of those contracts.

A. I did. I participated in the negotiations of all of our coal contracts.

Q. Including Berwind-White's contracts?

A. Including Berwind-White's contracts.

Q. Pursuant to those contracts did Berwind-White deliver to the several plants of the New York Edison Company and the United Electric Light & Power Company the quantities of coal required by those contracts during 1934 and 1935?

A. They did.

Q. And how were those deliveries made?

A. In the manner which I have described.

Q. Pursuant to that same practice?

A. Yes.

Q. Each of these contracts, Exhibits 12 to 16 inclusive, provides under the heading "Consignment" that shipments [fol. 99] are to be consigned to your company's—and I quote this—"Shipments are to be consigned to the buyer alongside its power stations, New York City, as directed."

Will you explain the procedure followed by your companies and Berwind-White pursuant to this provision?

A. That is the procedure which I have previously described. I will repeat it if you want me to.

Q. That is the procedure which begins with your notifying the company of your requirements weekly and their delivery pursuant to the practice that you have described?

A. That is right.

Q. In entering into each of these contracts did your companies contemplate the mining by Berwind-White of Eureka coal in its mines in Pennsylvania and the delivery of such coal from such mines pursuant to the practice you have described?

A. We did.

Mr. Lyons: Do you want to cross-examine?

Mr. Baum: I would like to ask him a few questions.

Cross-examination.

By Mr. Baum:

Q. Is that coal shipped to you f.o.b. mines?

A. No, sir.

Q. Did the Berwind-White Coal Mining Company ever try to collect any money from you when they did not deliver to you because of a train wreck or something like that, en route?

A. Never.

Q. Did those cars belong to the Pennsylvania Railroad or to the Berwind-White Coal Mining Company?

A. The Berwind-White Coal Mining Company.

Q. And the barges are your barges, or Berwind-White's?

A. Berwind-White's barges.

[fol. 100] Q. Well, then, have you got anything to do with this until you get your coal at your power house?

A. Well, technically, according to the terms of the contract perhaps not.

Q. Well, now, let me ask you: Suppose that a barge sinks before she delivers the coal at your pier, do you pay for the coal?

A. Certainly not.

Q. It isn't your coal, is it?

A. No.

Q. That is your coal when it gets into the bunkers?

A. It is our coal when it gets alongside the dock.

Q. Alongside the dock?

A. Yes.

Q. Well, when the boat gets alongside the dock——

Mr. Lyons: You are asking him now who has title—whose property the coal is, aren't you?

Mr. Baum: You mean he doesn't know? He doesn't know who owns the coal?

Mr. Lyons: Well, that is a question of law, isn't it?

Mr. Baum: He knows how Berwind-White runs their business!

Mr. Lyons: I am not concerned with the question of title and I am perfectly willing to agree that the title to the coal passes when the barges come alongside the plants. So—I am not concerned with the question of title, because under the authorities, and I might quote from Justice Holmes—"Witty diversities of the law of sales have nothing to do

with the conception of interstate commerce, which is a practical conception, and is not concerned with the legal technicalities."

[fol. 101] By Mr. Baum:

Q. Do you make your payments to the office of Berwind-White in New York City?

A. Yes.

Q. And you have already told us that you put your orders in at New York City?

A. Yes.

Mr. Lyons: Excuse me. We will concede these contracts are made in New York City.

Mr. Baum: Well, now, let's summarize these concessions so we can save time:

Is it conceded, first, the contracts are made and entered into in New York City?

Mr. Lyons: Right.

Mr. Baum: That the orders calling for the weekly or daily delivery of coal are made to the office in New York City?

Mr. Lyons: Yes.

Mr. Baum: That title to the coal does not pass, or is not that of the Edison Company, until such time as the barge comes alongside the dock?

Mr. Lyons: Right.

Mr. Baum: That the delivery facilities are all furnished by the seller, both railroad cars and barges and that the buyer has nothing to do with those facilities and deliveries?

Mr. Lyons: Right.

Mr. Baum: We are agreed on that then.

Mr. Lyons: When you say the buyer had nothing to do with it——

Mr. Baum: Well, I will ask him.

Mr. Lyons: I have explained that the buyer is very much interested in those delivery facilities, so far as obtaining delivery is concerned, but he does not have any responsibility so far as seeing that the coal arrives alongside the plant.

[fol. 102] By Mr. Baum:

Q. Do you, or have you ever rejected coal because it was not delivered in the method in which it was customarily done

by Berwind-White?

A. No.

Q. You don't care what pier it comes from in New Jersey, do you?

A. No.

Q. You happen to know it is their practice to take a certain pier?

A. That is right.

Q. So far as you know they can use any railroad or any barge, whether they own it or not?

A. Yes.

Q. And you don't care?

A. We don't care.

Q. You want coal of the quality you have specified?

A. That is right.

Mr. Baum: That is all for the time being.

Mr. Lyons: I want to ask him a few questions.

By Mr. Lyons:

Q. Does the fact that the Berwind-White Company has consistently maintained the delivery facilities that you have described and has delivered coal under the practice you have described have any bearing on your negotiation of contracts for the purchase of coal from them?

A. That is the reason we continue to do business with them.

Q. Because they have maintained that delivery system?

A. Yes, because they——

Q. You do care, then, about the manner in which the delivery of the coal is made to you?

Mr. Baum: He said before he did not.

A. We do not care so long as we get the coal in accordance with the terms of our contract.

[fol. 103] Q. But in negotiating these contracts the fact that you have gotten coal over this delivery system is an important factor to you, is it not, in contracting for further purchases of coal from the Berwind-White Company?

A. That is the reason that we continue to do business with Berwind-White.

Q. All right. And you do business with Berwind-White, continue to do business with Berwind-White because they supply Eureka coal?

A. Because their deliveries are satisfactory and their coal is satisfactory.

Mr. Lyons: All right. Is that all?

By Mr. Baum:

Q. Have you been over the Pennsylvania mining regions to familiarize yourself with the different types of coal and the seams from which they are produced?

A. Some of them. I have not been over the whole region. I have been over different parts of it.

Q. This so-called Eureka coal that is furnished by Berwind-White, could that be duplicated in Pennsylvania other than in the Cambria and Somerset regions?

A. No.

Q. You are positive?

A. Yes.

Q. Did you ever have a contract under which they have furnished coal from other sources?

A. That is possible. I would have to go back over the records to tell you definitely. I believe they did.

Q. Now you told us before that you have been in this business for over twenty years, and that it is your practice to familiarize yourself with all those details?

A. Much has happened in twenty years and I don't remember it all.

Q. Now, you try to familiarize yourself with the coal business, there have been some important strikes in the coal [fol. 104] industry?

A. In 1922 I believe Berwind did supply us with coal from its southern operation at that time.

Q. You mean from its West Virginia mines?

A. From its West Virginia mines, I believe they did.

By Mr. Lyons:

Q. Was that Eureka coal?

A. Not Eureka coal.

Q. Then the coal from those mines was not the coal for which you contracted?

A. That is right, but that was an emergency and we took any coal that we could get.

By Mr. Baum:

Q. Are you familiar with all the terms of this contract?

A. I believe I am.

Q. You know that clause on Federal and State legislation, dealing with the imposition of taxes during the time that you made this contract?

Mr. Lyons: Will you read that question back?

Q. Are you familiar with this section under the heading Federal and State Legislation which refers to the payment of taxes that intervene during the time of the contract?

Mr. Lyons: Doesn't the contract speak for itself by your own objections?

Mr. Herman: Right.

Mr. Lyons: You sustain that objection?

Mr. Herman: Right.

Mr. Baum: It works both ways.

By Mr. Baum:

Q. You deal with other coal companies in New York?

A. Yes.

[fol. 105] Q. Such as the Dale Lehigh Coal Company?

A. We do no business with them.

Q. You do business with the Meenan Coal Company?

A. We do not.

Q. With Weber, Bunke-Lange Coal Company?

A. We are talking now about coal for our generating stations, not the small quantities that are purchased for domestic purposes in our various show rooms, I assume that is right.

Q. Yes.

A. We are talking only about bituminous coal burned in our generating stations. We do no business with them.

Q. This is the only company you do business with?

A. We do business with about a dozen other companies.

Q. Will you name the other companies, please?

A. Well there is——

Mr. Lyons: How is that relevant?

Mr. Baum: This man's business is to know all about the various coal companies, about this business, etc.; and he testified that he knows all about the various types of coal, let us find out that he does.

Mr. Lyons: All right, go ahead.

The Witness: What is the question?

Q. The question was, first, what are those other coal companies?

A. Well, there is J. H. Weaver & Company.

Q. Just a few.

A. Coleman Company. The Argyle Coal Company; I ought to know them all, I do.

Q. Well?

A. Johnstown Coal & Coke Company; the Pennsylvania Coal and Coke Company.

Q. And there are others?

A. There are others, yes.

[fol. 106] Q. Now, you have familiarized yourself with the coal that is furnished by these various companies?

A. Yes.

Q. Do they differ materially in quality and substance?

A. They do.

Q. Now, describe in your own words, the differences between some of these companies insofar as the quality of coal is concerned, which you must make tests for in order to—preliminary to your purchases?

A. The coal of Coleman & Company and J. H. Weaver, which comes from the Nantyglo region of Pennsylvania, which is also a B seam coal, is higher in volatile than Eureka coal; it is also higher in sulphur; it is lower in fusion; it is coal that will have as many heat units in it as the Eureka coal, but it is not, because of its high sulphur content, it will not operate as satisfactorily on stokers with high ratings.

Q. Is there no coal of any other company that is similar to the coal which you buy from the Berwind-White Company?

A. Yes.

Q. What company?

A. There is a coal known as Hughes No. 2. There is another coal known as Yellow Run produced out in Pennsylvania.

Q. Are they coals from Somerset and Cambria Counties in Pennsylvania?

A. They are.

Q. Adjoining the Berwind-White mines?

A. I don't know that they are contiguous, but they are in the same neighborhood.

Q. And their seams are substantially the same?

A. The same.

By Mr. Lyons:

Q. Do the companies that produce the coal that you have just mentioned—are they producers of coal?

A. What companies?

[fol. 107] Q. What companies produce the coal that you have just mentioned?

A. The Hughes No. 2, I believe that is G. A. Hughes Company. I don't know the name of the operator of the Yellow Run.

Q. But those companies produce that coal?

A. I know that Hughes does, because we have bought the coal from the Hughes Company.

Q. And they sell to consumers?

A. They sell to consumers.

Q. They don't sell to Berwind-White, do they?

A. I don't know.

By Mr. Baum:

Q. Well, now, in the consumption of coal that you need for the purpose of generating steam necessary to operate your plants, you buy from Berwind-White Coal Mining Company and from other coal companies? Do all your contracts run the same way, are they substantially the same?

A. I don't know what you mean by your question.

Q. Do you require that all these companies deliver the coal alongside your pier?

A. No, we do not.

Q. Is there a material variance in practice in purchases from other coal companies?

A. I believe there are two of our contractors who make deliveries alongside our stations, and the rest of them do not.

Q. The rest of them ship them from the mines, don't they?

A. Most of the coal. Most of the rest of them—in most of the rest of the cases we buy the coal f. o. b. cars at the mine; in two or three cases we buy the coal f. o. b. tidewater.

Q. It is only in the Berwind-White case that the coal comes to your pier?

A. No, we have one other contractor, a very large supplier whose coal comes alongside.

[fol. 108] Q. Who is that contractor?

A. That is Pocahontas Fuel Company.

Q. So that with Pocahontas Fuel Company and Berwind-White, the coal is brought alongside the pier, but the other companies that you contract for you will take that coal f. o. b. mines.

A. F. O. B. mines and f. o. b. tidewater.

Mr. Baum: That is all.

Mr. Lyons: That is all.

GEORGE MACDOUGALL, 177 Prospect St., Dumont, N. J., a witness called on behalf of the Taxpayer, being duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Will you give your name and address to the reporter?

A. George MacDougall; 177 Prospect Street, Dumont, New Jersey; business address 4 Irving Place, New York.

Q. Mr. MacDougall, you are now employed by Consolidated Edison Company?

A. Yes.

Q. In what capacity?

A. Assistant Comptroller.

Q. And prior to the organization of Consolidated Edison Company, you were employed by New York Edison Company and United Electric Light & Power Company?

A. Yes.

Q. In what capacity?

A. Assistant auditor.

Q. And in those capacities you have had the responsibility of checking the New York City tax assessments against those companies?

A. Yes, sir.

Q. Was a sales tax under Local Law No. 20 assessed against the New York Edison Company with respect to purchases of coal from Berwind-White Coal Mining Com- [fol. 109] pany?

A. You mean did it appear on your invoices?

Q. I mean did the City assess a sales tax against the New York Edison Company.

A. They alleged a deficiency of sales tax.

Q. For what period, against the New York Edison Company?

A. Well, the New York Edison Company, under Local Law No. 20 of 1934, from December 10, 1934, to July 1, 1935, the New York——

Q. Just a minute. With respect to purchases from Berwind-White Coal Mining Company, what was the figure on which the deficiency was based?

A. For the New York Edison Company?

Q. Yes.

A. For the same period, $667,675.97.

Q. Will you state that period again?

A. This is the period, of the New York Edison Company, under Local Law No. 20, December 10, 1934, to July 1, 1935, $667,675.97.

Q. I believe you said before it was December 1, 1935. I wanted to correct that.

A. No, I said July.

Q. Do you know the amount of the tax that was assessed on that figure?

A. Well, the amount of the tax would be 2 per cent of that amount, I haven't got it.

Q. And were penalties assessed also?

A. Penalties were assessed too.

Q. Was there a sales tax assessed against the United Electric Light & Power Company on purchases of coal from the Berwind-White Coal Mining Company?

A. Yes.

Q. For what period?

A. Under Local Law No. 20 from December 10, 1934, to May 31, 1935.

Q. And what was the amount on which that assessment—the amount of sales on which that assessment was based?

A. $371,669.22.

Q. And the tax was 2 per cent?

A. Two per cent.

[fol. 110] Q. And penalties?

A. Plus penalties, or interest—it may have been interest.

Q. Was a sales tax assessed against New York Edison Company, Incorporated on account of sales of coal by Berwind-White to United Electric Light & Power Company and New York Edison Company?

A. I didn't quite get your question.

Q. Was a sales tax assessed against New York Edison Company—no, wait a minute—the New York Edison Company, Inc., that is the one.

A. Oh, yes.

Q. On account of sales of coal to it by Berwind-White Coal Mining Company?

A. That is under Local Law 25, from August 1, 1935——

Q. Wait a minute. I asked you whether a sales tax was assessed against that company under Local Law No. 20?

A. No.

Q. None?

A. None.

Q. Was a personal property tax—before I ask that question, were any of these sales taxes that you testified to paid by those companies?

A. No.

Q. Was a personal property tax assessed against the United Electric Light & Power Company covering coal that had been purchased from Berwind-White Coal Mining Company?

A. Yes.

Q. For what period?

A. Under Local Law No. 25, from March 1, 1935, to July 31, 1935.

Q. And what was the amount on which the assessment was based?

A. $115,306.18.

Q. And was a similar personal property tax assessed against New York Edison Company, Inc. with respect to coal purchased from the Berwind-White Coal Mining Company?

A. Yes.

Q. For what period?

A. August 1, 1935, to December 31, 1935.

Mr. Baum: Can't we cut this short?

[fol. 111] By Mr. Baum:

Q. Have you paid any of these taxes?

Mr. Lyons: Now, wait a minute, he is bringing this out, Mr. Baum. I am just getting to the end of this, if you don't mind.

By Mr. Lyons:

Q. What was the amount of purchases on which that tax was assessed?

A. $925,547.97.

Q. And the taxes there were at the same rate, at 2 per cent, plus penalties?

A. Two per cent plus penalties.

Q. Now, did you pay—were those property taxes paid by the United Electric Light & Power Company and New York Edison Company, Inc.?

A. These amounts were deposited with the City against these taxes.

Q. That includes taxes and penalties, the amount that was deposited?

A. Taxes and penalties.

By Mr. Baum:

Q. You have paid that, do you say?

A. No, they were deposited with the City.

Q. What do you mean deposited?

A. Placed, with the City, placed with the City, deposited with the City against these taxes, as per your request, and Mr. Solomon's letter.

Mr. Lyons: All right, that is all, Mr. MacDougall.

By Mr. Herman:

Q. You say you deposited these personal property taxes with the City. That was in reference to the hearing—you [fol. 112] were required to deposit that money before you were allowed a hearing, is that correct?

A. That is my understanding.

Q. And the only reason you deposited those moneys was to obtain such a hearing?

A. And to avoid any further penalties.

By Mr. Baum:

Q. The point is, there has been no final determination of tax against the company?

A. No.

Q. There is going to be a hearing, the matter will be considered, and that applies to all the socalled assessments that you have been talking about?

A. Yes.

Mr. Lyons: The City has the money though.

LELAND B. BONNETT, 32 Crescent Terrace, Brooklyn, a witness called on behalf of the Taxpayer, being duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Will you state your name and address for the record?

A. Leland B. Bonnett; and the business address is 380 Pearl Street, Brooklyn; home address 32 Crescent Terrace, Brooklyn.

Q. Mr. Bonnett, what is your position with the Brooklyn Edison Company?

A. I am the purchasing agent.

Q. And what are your duties in that capacity with respect to the purchase of coal?

A. The negotiation of contracts and seeing that we get the receipt of the coal.

Q. How long have you been associated with the Brooklyn Edison Company?

A. Fourteen years.

[fol. 113] Q. During that period you have had to do with the purchase of coal?

A. In the last, say eleven years.

Q. What is the business of the company?

A. The business is the generation of electricity and the distribution and sale of it.

Q. The coal is used for the production of steam in connection with the generation of electricity?

A. That is right.

Q. Does your company make tests or other experiments to determine which particular kinds of coal are best adapted for use in your plants?

A. We have. We find that certain coals will function and certain coals will not.

Q. Has Berwind's Eureka coal been tested in that connection?

A. It has.

Q. And what did those tests reveal with respect to the quality of Berwind's Eureka coal and with relation to your requirements?

A. It revealed excellent quality entirely satisfactory for use in any of our plants.

Q. How long has your company been buying Eureka coal from Berwind-White?

A. Since 1921.

Q. In approximately what quantities?

A. Well, for many years back, approximately 300,000 to 400,000 tons a year.

Q. During that period you have consistently purchased Eureka coal from Berwind-White?

A. Yes.

Q. What is the source of the Eureka coal, do you know?

A. Eureka coal comes from the State of Pennsylvania, B seam, in the counties of Cambria and Somerset.

Q. Is that the only source of Eureka coal?

A. That is the only source of Eureka coal.

Q. Does the quality of the coal have any particular relation to its source?

[fol. 114] A. Yes, coal from different sources has different qualities, different characteristics.

Mr. Baum: May I interrupt?

By Mr. Baum:

Q. Mr. Bonnett, you heard Mr. Savage's testimony?

A. Yes.

Q. You would testify to substantially the same, wouldn't you?

A. Yes. I found nothing to disagree with what he said.

Mr. Baum: Can't we let it go that way?

Mr. Lyons: I am satisfied, if you will stipulate.

Mr. Baum: That is what he said; he will testify substantially as Mr. Savage has, being purchasing agent for another utility company, which is part of the Consolidated Edison system, isn't it?

The Witness: That is right.

By Mr. Lyons:

Q. You would testify substantially to the same things that Mr. Savage testified to with respect to the quality of Eureka coal, the source of the coal, the delivery facilities of the Berwind-White Coal Mining Company, the practice carried on in purchasing it—carried on by Brooklyn Edison Company and Berwind-White Coal Mining Company in negotiating contr -ts for the purchase of coal between those

companies, and in making deliveries of coal under those contracts?

A. Yes.

Mr. Lyons: Well, I don't know, maybe we better run through these questions.

[fol. 115] Mr. Baum: All right, you are entitled to if you want; you can't add anything more than Mr. Savage. Mr. Savage has been in the business, I think, with all due deference to you, even a little bit longer than you.

Mr. Lyons: That is true, but I want to get this in with respect to each purchaser.

By Mr. Lyons:

Q. Will you testify, Mr. Bonnett, that in the light of the practise with respect to quality, source, and delivery of Eureka coal that you contracted for Eureka coal from the mines in Somerset and Cambria Counties, and for the delivery of such coal over the delivery facilities maintained by Berwind-White, in these contracts made in 1934 and 1935?

A. I do, yes.

Q. That the coal delivered pursuant to those contracts was delivered from the mines over the delivery facilities maintained by Berwind-White?

A. Yes.

Mr. Lyons: All right.

Mr. Baum: No questions, Mr. Bonnett.

Mr. Lyons: Just a minute, I want to ask Mr. Bonnett some more questions.

By Mr. Lyons:

Q. Mr. Bonnett, was the sales tax assessed against the Brooklyn Edison Company on purchases of coal from Berwind-White Coal Mining Company?

A. It was, yes.

Q. For what period?

A. December 10, 1934, to May 31, 1935.

Q. And what was the amount on which those taxes were assessed—the amount of purchases?

A. The amount on which the tax was assessed was $457,090.93.

[fol. 116] Q. And the tax was at the rate of 2 percent, plus penalties?

A. Correct.

Q. Was that paid?

A. That was not paid.

Q. Was the personal property tax assessed against the Brooklyn Edison Company on purchases of coal under Local Law No. 25?

A. Yes.

Q. For what period?

A. From May 1, 1935, to December 31, 1935.

Q. And on what amount?

A. $1,462,638.65.

Q. And that was at the rate of 2 percent?

A. Two percent, yes.

Q. Plus penalties?

A. Plus penalties.

Q. Was that tax paid?

A. Deposit was made with the Comptroller, which includes this amount, yes.

Mr. Lyons: All right.

By Mr. Baum:

Q. You have not conceded your liability under any of those taxes, have you?

A. I have nothing to do with that.

Q. But as a matter of fact you are contesting that; but you know from your own information that that is being contested now?

A. Yes.

Mr. Lyons: All right, I want to ask another question, Mr. Bonnett.

By Mr. Lyons:

Q. When you contract for coal from Berwind-White, you contract for fresh mined coal?

A. We do.

Q. But you have to keep storage facilities, because no producer and seller maintain storage to fill your requirements, isn't that true?

A. Will you state that again?

Mr. Baum: Will you state that again?

[fol. 117] Q. Do you have to keep any storage facilities?

A. We have small storage facilities, yes.

Q. What is the reason for that?

A. To take care of any emergencies that might arise when the regular movement of coal might be interrupted.

Q. Well, does any producer or seller of coal maintain storage in New York?

A. Not to my knowledge.

Mr. Lyons (to Mr. Baum): We will have to recall Mr. Savage unless you concede that.

Mr. Baum: I thought that was covered. Just one question.

By Mr. Baum:

Q. You were asked whether any producer of coal maintains facilities?

A. That is correct.

Q. Now, I am going to ask you whether any seller of coal maintains facilities?

A. Not enough for our purposes.

Q. Well, how do you know?

A. Because anyone who has such facilities would be sure to tell us about them.

Q. That is all you have to base it on?

A. Yes.

Mr. Baum: That is all.

Porter C. Savage, a witness on behalf of the Taxpayer, being duly recalled, testified as follows:

Redirect examination.

By Mr. Lyons:

Q. Mr. Savage, do you know whether any producer or seller of coal in the quantities that you require maintains storage facilities in New York?

A. I don't know of any such facilities.

[fol. 118] Q. Do you know why such facilities are not maintained?

Mr. Baum: Well now, how is he competent to say why they are not maintained? Does he know why coal companies do or don't do things?

Mr. Lyons: That is his business.

Mr. Baum: No, he is in the business of purchasing coal, he is not in the business of operating mines.

Mr. Lyons: Well, let us ask him if he knows.

Mr. Baum: Well, that is objected to because he is not competent to answer that, do you know why?

Mr. Lyons: Well, if he knows——

Mr. Baum: It is purely an opinion on his part to state if he knows why they don't keep it, if they don't.

By Mr. Lyons:

Q. Well, does coal deteriorate when it is kept in storage?

A. Slowly, yes.

Mr. Baum: He testified to that.

Q. Would not the storage facilities necessary to supply plants such as yours require a tremendous amount of space and investment?

A. Yes.

Q. And the coal delivered, if any such storage were maintained, the coal would have to be delivered to your plants by barge, wouldn't it?

A. It would.

Q. Do you know of any coal mines in the state of New York?

A. I know of none.

[fol. 119] Q. And the coal kept in such storage would have to be brought in from outside the state?

A. That is right.

Mr. Baum: You know that many sellers of coal have coal stored here, don't you?

The Witness: I know that there is coal stored in the city of New York, but not in the quantities to take care of our requirements.

George W. Jones, 45 Gramercy Park, New York City, business address 385 Flatbush Avenue Extension, Brooklyn, a witness called on behalf of the Taxpayer, being duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Will you state your name and address for the record?

A. George W. Jones, 45 Gramercy Park; business address, 385 Flatbush Avenue Extension, Brooklyn.

Q. What is your position with the Williamsburgh Power Plant Corporation?

A. Vice-President.

Q. How long have you been associated with the company?

A. With the Williamsburg since January 1, 1930.

Q. Do you have charge of negotiating and making contracts for the purchase of coal?

A. I have.

Q. What is the business of the Williamsburgh Power Plant Corporation?

A. It generates electricity to run the B. M. T. System.

Q. What use is made of coal by the company?

A. It generates steam which, in turn, turns the turbines.

[fol. 120] Q. How many power plants does the company have?

A. We only have one that uses Berwind-White coal.

Q. Where is that plant located?

A. On the East River, in the Borough of Brooklyn.

Q. Are you familiar with Berwind's Eureka coal?

A. Yes.

Q. How long has your company been purchasing Berwind's Eureka coal from the Berwind-White Coal Mining Company?

A. To my personal knowledge, 17 years, but I understand longer than that.

Q. What has been the experience of your company with respect to the quality of that coal, so far as its adaptability for use in your plants is concerned?

A. It has always proved entirely satisfactory.

Q. Have you ever bought Berwind's Eureka coal from any other company than Berwind-White?

A. No.

Q. Do you know the source of Berwind's Eureka coal?

A. Yes.

Q. What is it?

A. Cambria and Somerset Counties, Pennsylvania.

Q. Does it come from particular mines?

A. Yes, our contract specifies particular mines.

Q. Well, does the quality of the coal have any relation to the mine from which it comes?

A. That is my understanding.

Q. Is that why you contract for particular mines?

A. Yes.

By Mr. Baum:

Q. Mr. Jones, you have heard Mr. Savage and Mr. Bonnett. Would you add anything further to what they have said, or would you testify substantially the same as they did?

[fol. 121] A. As to the quality of coal, delivery system and so on and so forth, I would testify the same as Mr. Savage testified.

By Mr. Lyons:

Q. You would testify that you contract for Eureka coal to be produced at the mines of the company in Somerset and Cambria Counties and shipped from those mines to your plants?

A. Yes.

Q. And that you require constant deliveries?

A. Right.

Q. And that you contract for delivery over the delivery system of the Berwind-White Company?

A. Yes.

Q. And that the contracts in 1934 and 1935 were made under those circumstances?

A. Yes.

Q. And that the contracts in all prior and subsequent years were similarly made?

A. During the period that I negotiated the contracts.

Q. And that those contracts contemplated direct delivery from the mine to your plant?

A. Yes.

Mr. Lyons: All right, Mr. Jones. I want to ask you about the taxes.

Q. Will you state what taxes have been assessed against the Williamsburgh Power Plant Corporation with respect to its purchases of coal from Berwind-White Coal Mining Company, the period and the amount on which the tax was based, and the tax and penalties?

A. For the period December 10, 1934, to February 28, 1935, on sales amounting to $152,534.59, the tax on that amount was $3,050.69. The interest——

Q. Was that a sales tax under Local Law No. 20?

A. Sales tax under Local Law No. 20. The interest and penalties amount to $427.10, making a total for that particular period of $3477.79.

[fol. 122] For the period from March 1, 1935 to May 31, 1935, assessed on $158,408.66, the tax being $3168.17, interest and penalties $348.50, or a total of $3516.67.

And from June 1, 1935, to August 31, 1935, assessed on $199,021.79, the tax being $3980.44, interest and penalties $358.24, making a total of $4338.68.

Q. Now, did you give the grand total?

A. The grand total being $10,179.30 as the tax.

Q. As the tax?

A. Yes, as the tax. And $1153.84 penalties or interest; making the total $11,333.14.

Q. And that covers the period from December 10, 1934, to August 31, 1935?

A. Right.

Q. Did your company pay those taxes and penalties?

A. Yes, sir.

Q. To the City of New York?

A. Yes, to the City of New York, the Comptroller.

By Mr. Baum:

Q. But you are now contesting that in the courts, are you not?

Mr. Lyons: No, that is the sales tax. That is the sales tax, that is not the property tax.

By Mr. Baum:

Q. Is that the sales tax?

A. The sales tax.

Q. You paid that voluntarily?

A. We paid it under protest.

Q. Are you contesting that now?

A. We have had a hearing before this Board, something over a year ago.

Q. Has there been any final determination?

A. No, sir.

[fol. 123] Q. In other words, that has not been finally determined or adjudicated in any way?

A. No, sir.

Mr. Lyons: But the tax has been paid. The tax has been paid.

By Mr. Baum:

Q. Under protest?

A. Yes.

By Mr. Herman:

Q. You stated that you have other power plants located in the City of New York wherein you use other than Berwind-White coal?

A. We have one small standby plant.

Q. I see; and you use coal other than Berwind-White coal in that plant?

A. We use both bituminous and anthracite coal.

Q. Is the type of work which you do in this power plant similar to the type of work which you do in the power plant wherein you use Berwind-White coal?

A. No.

Q. How is that different?

A. Well, it is similar in this way, that we generate the power; but the standby plant ordinarily does not run except during the rush hour, only at the peak loads, we put that plant in just to bolster up the current in the lower end of Brooklyn. Some times it may not operate for 10 or 12 hours.

Q. What type of coal do you use in this standby plant, do you call it?

A. We use both bituminous and anthracite coal.

Q. Could that type of coal be used in the plant which is—in the plant wherein you use coal made by Berwind-White, mined by Berwind-White?

A. No.

[fol. 124] Q. Why is that so?

A. At our main plant we have a continuous load and the stokers are quite different from the old standby plant.

Mr. Lyons: I want to call Mr. Starboard, anyway.

Mr. Baum: All right.

By Mr. Herman:

Q. Is it possible to use any other type of coal other than the Berwind-White coal at this Williamsburgh Power plant?

A. Well, we do use it—ordinarily we have four, once in a great while five suppliers. But the coal all comes from the region from which the Berwind-White coal is mined.

Q. In other words, you are interested in coal which can be used advantageously in your Williamsburgh power plant?

A. Right.

Q. And it is not necessary that it has to be Eureka coal, as long as the coal satisfies the requirements of your particular power plant?

A. Well, of course, one of the main things that we would look to is the reliability of the delivery of the coal.

Mr. Lyons: Mr. Herman, I might point out that these contracts with Williamsburgh specifically provide for the delivery of Eureka coal from particular mines, so that that is what the contract calls for and——

Mr. Baum: Just a question or two, Mr. Jones.

By Mr. Baum:

Q. You stated that in addition to the Berwind-White Coal Mining Company there are three or four other coal companies that supply the needs of the Williamsburgh power plant?

A. Yes, right.

[fol. 125] Q. Is that coal substantially the same as the Berwind-White coal?

A. I will say this, that we use the Berwind Eureka coal as our standard, 100 percent. And we base our purchases of other coal upon the price of the Berwind coal—in other words, that is our yardstick.

Q. Price or quality?

A. Both.

Q. Well, now, referring specifically to quality, is this other coal that is purchased from the other companies substantially the same as the Berwind coal?

A. We have one coal that on using our yardstick, where Berwind was shown 100 percent and the next coal was shown at 99 percent.

Q. The next is the Hughes Company?

A. No, sir.

Q. You don't know the name of that company?

A. No, we don't buy from Hughes.

Q. I say, what is the other company?

A. Madeira Hill—Cortright Coal Company; and during the period we are talking about now, we bought from the Consolidation Coal Company.

Q. Do your contracts with these other companies run substantially the same as the Berwind-White contract, or do they differ substantially?

A. Every one of our contracts differs.

Q. You take some of the coal F. O. B. mines from these other companies?

A. Outside of Berwind we buy all of our coal F. O. B. the coal piers in Jersey City.

Mr. Baum: That is all. Now, we will agree next time on those other witnesses.

Mr. Lyons: Yes, I want to ask Mr. Starboard a few questions, and we can then enter into a general stipulation on the rest of them.

[fol. 126] Mr. Herman: Hearing adjourned to May 21, 1937, at 10:00 A. M.

Mr. Herman: This is a continuation of a hearing last held on May 6, 1937.

Mr. Lyons: It is agreed between counsel that, if the purchasing agents for the customers named below were called to testify, they would testify to substantially the same facts with respect to the course of dealing in the purchase of coal from Berwind-White Coal Mining Company, as appears in the testimony of Mr. Savage. They would also testify that the contracts for the purchase of coal which their companies made with Berwind-White in 1934 and 1935, were made in the light of that course of dealing. They would also testify that they received deliveries of the coal pursuant to those contracts, in accordance with the course of dealing referred to.

(Stipulation continued by Mr. Baum.)

Mr. Baum: In fact, they would testify substantially as did Mr. Savage, the purchasing agent for the Consolidated Edison Company, as well as Mr. Jones, of the Williamsburgh Power Plant Corporation, who were called here as witnesses, testified; also Mr. Bonnett, of the Brooklyn Edison.

Mr. Lyons: I think that is satisfactory. I will give you a list of customers, as follows:

All America Cables.
Arbuckle Brothers.
Caddell Drydock & Repair Co.
Clyde-Mallory Lines.

[fol. 127] Compagnie Generale Transatlantique (French Line).

Compania Transatlantica (Spanish Line).
L. A. Dreyfus Company.
Interborough Rapid Transit.
International Mercantile Marine Co.
N. Y. & Porto Rico Steamship Co.
North Atlantic & Gulf Steamship Co.
Ocean Dominion Steamship Co.
Pioneer Terminal Corp.
U. S. Navigation Co.

Mr. Lyons (continuing): The Receiver of Interborough Rapid Transit Co. has been assessed a sales tax by the City of New York, under Local Law No. 20, upon purchases of coal from Berwind-White Coal Mining Company, made during the period beginning December 10, 1934, and ending December 31, 1935, in the amount of $45,760.94, including interest and penalties in the amount of $6,110.66, upon purchases in the amount of $1,982,514.22.

Clyde-Mallory Lines, Compania Transatlantica (Spanish Line), and Arbuckle Brothers have each been assessed a sales tax by the City of New York under Local Law No. 20 upon, in each case, a part or all of the purchases of coal from Berwind-White Coal Mining Company, made during the same period. None of these taxes has been paid, and the companies are contesting the validity of the imposition of these taxes by the City of New York.

Mr. Herman: No objection.

[fol. 128] FREDERICK D. SEYMOUR, a witness for the Taxpayer, having been previously sworn, testified as follows:

Cross-examination.

By Mr. Baum:

Q. Describe for us the New York office, both as to size, the number of men employed, the number of salesmen, the number of executives, located in the New York office?

Mr. Lyons: I am not sure that I see how that is material. We have conceded that the contracts were made in New York. How else could it be material?

Mr. Baum: It could be material in at least three different ways: The nature of what constitutes doing business in

New York will depend to a great extent upon the location of the activities in New York City. It is one thing to have three or four itinerant salesmen in New York and the main, home office, located outside the State. That is very common in the mail-order cases. It is another thing to have a very large permanent set-up here with materials and samples and other display. It is even still more important to find out whether the executives of the company stay here in New York and transact the business from New York. You have characterized this taxpayer as a producer. We want to characterize him, if possible, as a salesman-producer combination, which will bear materially upon the factual set-up in which a court decides what the situs of the transactions are.

Mr. Lyons: Well, just one principal comment: We are [fol. 129] not dealing here with the question of what constitutes doing business.

Mr. Baum: No. That is true.

Mr. Lyons: This is a sales tax and not a tax on transacting business.

Mr. Baum: That is right.

Mr. Lyons: Consequently, I don't see what bearing the activities of the company in New York have, so far as they deal with doing business.

Mr. Baum: I do not want to continue the harangue with you too much, but I will specifically state that the question of what constitutes an interstate commerce transaction is not so much as to whether the transaction is one that involves a shipment in interstate commerce, but is one in which a burden on interstate commerce is disclosed. This burden can only be arrived at by considering all of the factors that enter into the method of doing business on the part of this company. The question of the burden is the question of the evaluation of all these factors. Under those circumstances, the entire method of doing business is material in disclosing whether a burden on the commerce is here shown.

Mr. Lyons: I see your point of view, but I still object to the question.

Mr. Baum: And in considering that question, I have definitely in mind the case of McNeil Marble Company.

Mr. Lyons: Which, I think, is wholly immaterial.

Mr. Baum: But nevertheless it sets forth the requirements for a tribunal to disclose the method of doing busi-

ness by the taxpayer, preparatory to arriving at any con-
[fol. 130] clusion as to whether or not this is a burden on interstate commerce. I have no desire to go into irrelevant matters, but we might as well have the picture, as to what the company is doing in New York, as one of the factors in determining whether or not there should be liability in this case.

Mr. Lyons: I object to the line of inquiry on the ground that it is immaterial and irrelevant.

Mr. Herman: Objection overruled.

Mr. Lyons: Exception.

By Mr. Baum:

Q. You have my question?

A. The size of the office is approximately one floor of No. 1 Broadway. I do not know that I can give it to you in square feet, but I would take a guess that it is 150 feet long by approximately 50 or 60 feet wide, divided up into offices for the president, two vice-presidents, general sales manager, manager for the foreign and bunkering department, New York district sales manager; that covers a part of New England, and New York State, and New Jersey, and also covers other territories at our discretion; a research department, a small accounting department, not the entire accounting department for the company, principally on foreign work. And clerks for those various branches of work.

Q. About how many employees altogether?

A. I would say offhand about 25.

Q. Do I understand the president of the company, Mr. Dunlap, has his office here?

A. That is correct.

Q. You also said two vice-presidents of the company have their offices here?

A. That is right. Do you want to ask questions with
[fol. 131] reference to the vice-presidents—I don't know what you want to know. Two vice-presidents are in New York, yes.

Q. Are there any officers of the company located in Pennsylvania?

A. Yes, sir.

Q. Who are there?

A. The vice-president in charge of operations, and the treasurer, and the secretary.

Q. And the president and two vice-presidents are located here in New York?

A. That is correct.

Mr. Herman: How long has the company maintained its business in New York City?

The Witness: I can only answer that to my knowledge, since 1930, when I came with the company. And I would assume for a period of forty of fifty years, with some slight change in location during alterations.

Mr. Lyons: Could I interpose a question?

Mr. Baum: Yes.

By Mr. Lyons:

Q. What part of the business is supervised from the Pennsylvania office?

A. Principally the operations. There is also a sales office there.

Q. You mean the mining operations?

A. That is correct. Supervision of the mining operations is in Philadelphia.

Q. And also supervision of shipments of coal?

A. Shipments and accounting, billing and all.

Q. The main books of the company are kept in Philadelphia?

A. The main books of the company are in Philadelphia.

Q. What part of the business is supervised in New York?

A. Primarily the sales and financing end of the business. And, I might add, foreign transactions.

Q. Foreign sales?

A. Foreign sales.

[fol. 132] By Mr. Baum:

Q. One other matter we want cleared up. Where is payment made under these contracts?

A. I don't understand the question. Do you mean, where do we make payment?

Q. How is payment received?

A. Payment is received, in the case of the utilities, in New York, and transferred to Pennsylvania after notation is made.

Q. You say, in case of the utilities; what about the case of the steamship companies?

A. I believe that most of that comes into New York.

Q. Isn't it a fact that all the payment is made to the New York office in the first instance?

A. I don't know that I can answer that directly, but some payment is made directly to Philadelphia, and Philadelphia bills for the coal, on a Philadelphia bill-head, for some of the coal sold in New York.

Q. Do I understand that, let us take for example one of your large purchasers, namely, Consolidated Edison. How is Consolidated Edison Company billed?

A. By Berwind-White Coal Mining Company, during the period of 1934-1935 we are discussing, from New York.

Q. From New York. How does Consolidated Edison make payment? By check, I take it.

A. By check to our New York office.

Mr. Lyons: You say that is transmitted to Philadelphia?

The Witness: That is transmitted to Philadelphia.

Mr. Lyons: You mean, the checks?

The Witness: That is correct. No deposit is made in New York.

Mr. Lyons: The checks are deposited in a Philadelphia bank?

[fol. 133] The Witness: The checks are deposited in Philadelphia.

By Mr. Baum:

Q. I think we covered this point, but I wish to ask it of you. All of the contracts are signed, sealed and accepted by a duly authorized officer of the company in the New York office?

A. Not during the period 1934-1935. Contracts were also signed in Philadelphia by the vice-president there.

Q. Was that a new practice?

A. That was an old, established practice which has recently been changed.

Q. Contracts with the transportation and utility companies of New York City?

A. No, sir.

Q. Then, which contracts do you mean?

A. Philadelphia contracts.

Q. I am directing our attention to the transportation and public utility and steamship companies that are here involved in the assessment of the Comptroller. As to those companies is this a correct statement of the facts: That the

contracts are signed, sealed and accepted by a duly authorized officer of the company in the New York office?

A. That is correct.

Q. That might be Mr. Dunlap, and it might be one of the vice-presidents, and it might be the sales manager in charge?

A. That is correct. However, I might add that there may be a case where a vice-president, in the absence of somebody else, in Philadelphia, might sign a contract. I would not say there was a case of that kind, but it is possible.

Q. That, of course, is not the general practice?

A. That is not the general practice.

Q. There has been testimony given that the purchasers here in question sampled the coal as to quality. Will you describe the mechanics by which the sampling operation is [fol. 134] carried out? What coal? Where does the coal start, and how do you sample it in conjunction with the officials of these various companies here in question?

A. Sampling is an art in itself. We sample coal at the pier, by taking a shovel-full now and then from the coal as it is loaded into the boat, by hand. That sample is collected in 100 pounds or more piles. Then it is quartered and re-assembled and re-quartered and re-assembled a number of times until an actually representative sample of that original 100 pounds is obtained. That sample is then crushed to a small granular size, and sent to a chemist for chemical analysis. The same thing is done with the utilities themselves, except in a great many cases it is done automatically; perhaps, in chuting the coal to the bunkers, a flap may drop out every now and then, to get a representative sample of the coal as it flows—if you follow me,—it is then assembled into quantity and the same procedure gone through. Before contracting or continuing under a new contract, these large purchasers of coal want the coal sampled, or want to be assured that they are going to get coal in conformity with an agreed upon sample.

Q. Do you bring some of that coal to their plant in New York City, or do they join you at Harsimus Pier for an examination of the coal? How do they get their first contact with the sampling process?

A. In general practice—let me put it that way—the customer buys a quantity of coal, let us say a carload or a cargo or barge load, as a sample, and takes his own sample from that and has it analyzed.

Q. Is that cargo of coal part of a shipment in the process of being made, or is it just a sample, gift, on your part?

A. No. It is a purchase, I would say, always.

[fol. 135] Q. In other words, he makes a small purchase to start?

A. He may make a small or large purchase.

Q. And he does his own sampling of the coal?

A. He does his own sampling of the coal in the way he makes it, because there are a variety of ways of making samples, and you can produce almost any desired result.

Q. Is it the practice for any of these purchasers here in question to go to Pennsylvania in the mines and sample the coal there?

A. No. I would say that what inspection of the mines there has been, is to inspect the coal and to see our method of sampling there, and compare that with their own.

Q. But they do their own sampling here in the city?

A. Ordinarily.

Q. You say ordinarily. What do you mean?

A. I mean they may send an inspector down there and sample a car of coal or a particular consignment of coal, yes, but that is not the ordinary practice.

Q. The practice is to sample it themselves here in New York City?

A. That is correct.

Q. Directing our attention to this Eureka coal which comes from the "B" seam run of the mine, Eureka coal is the trade name, is it not?

A. That is right.

Q. It represents a certain quality of coal. Is that right?

A. Yes.

Q. I take it that you are sufficiently familiar with the Pennsylvania mining region to tell us the area in which that quality of B seam coal can be gotten or mined. Could you tell us where in Pennsylvania, so far as you know?

A. That quality of coal can be obtained in the counties of Somerset and Cambria, Pennsylvania; not all of the counties.

Q. What do you mean, not all of the counties?

A. That seam, while it runs through the counties, may [fol. 136] vary as it goes north. It gets higher in volatile and other qualities will change. The same seam of coal will change as it goes in a certain direction.

Mr. Lyons: When you said, not in all of the counties, you mean not in all parts of those two counties?

The Witness: That is correct. I would say that quality of coal is confined to an area probably of 100 or 150 square miles.

By Mr. Baum:

Q. You say, so far as you know, in no other part of Pennsylvania or anywhere else is there coal of this quality and calibre?

A. To the best of my knowledge, that is true, speaking from a chemical standpoint.

Q. Does the Berwind-White Company have all of the properties in Pennsylvania that encompass this area of the so-called B seam coal?

A. No.

Q. There are quite a number of other coal mining companies that have control of seams substantially the same as the B seam?

A. There are other companies who control portions of the same seam.

Q. You are familiar with those companies?

A. Some of them.

Q. They are your competitors, as a matter of fact?

A. That's correct.

Q. Do they call their coal Eureka coal?

A. No, sir.

Q. What do they call the B seam coal?

A. They generally call it B seam coal. In some cases they may call it Navy standard coal, or they may have their own trade name for it.

Q. In other words, there are a lot of trade names for that quality of coal?

A. That is correct.

[fol. 137] Q. And you use one of them.

A. That is correct.

Q. You heard the testimony of Mr. Savage to the effect that he dealt with other coal companies besides Berwind-White?

A. I did not hear his testimony, but I have read it.

Q. And he stated that he got the same seam of coal from these other companies?

A. Correct.

Q. Have you ever had occasion, or do you know of any occasion in which you have had to go to these other companies to get some of your B seam coal, for various reasons, whether strike or otherwise, in order for you to fill your orders?

A. Never, to my knowledge.

By Mr. Lyons:

Q. Is the Berwind-White Company the largest producer of that particular grade of coal?

A. To my knowledge, it is by far the largest company.

By Mr. Baum:

Q. Berwind-White also has mines in West Virginia. That has been testified to by Mr. Dunlap?

A. No, that is not correct. Berwind-White Coal Mining Company does not own mines in West Virginia.

Q. What do they own in West Virginia?

Mr. Lyons: I believe Mr. Dunlap testified that they do not own mines in West Virginia; that they act as sales agent for other companies who own mines in West Virginia.

By Mr. Baum:

Q. Those companies do not put out this B seam quality of coal, do they?

A. There is no B seam coal in West Virginia.

[fol. 138] Q. What kind of coal is there in West Virginia?

A. There are various and sundry kinds of coal in West Virginia; from high volatile to low volatile coal.

Q. Could you, or did you ever make delivery of coal in New York City pursuant to these contracts, from the West Virginia mines?

A. Not during the term which we are discussing.

Q. During any term?

A. Yes.

Mr. Lyons: Just a minute. That question——

Mr. Baum: You can clear it up.

Mr. Lyons: Was the coal delivered coal that was called for by the contract?

The Witness: It was not represented as B seam coal. It was under an emergency condition, and only under emergency conditions, and so represented as West Virginia coal.

By Mr. Baum:

Q. I think we have it in the record, but I will again ask you in order to be doubly sure. Delivery under these contracts with the utility, transportation and steamship companies is required to be made to points in New York City, is it not?

A. It is.

Q. Except for the Austin Nichols case and the Arbuckle Brothers case, which I think you cited to us once before?

Mr. Lyons: No. It is Austin Nichols and New England Steamship.

By Mr. Baum:

Q. These contracts call for delivery in New York City alongside dock?

A. New York City.

[fol. 139] Q. Do you know how this name Eureka evolved and how long it has been in use and in vogue?

A. I don't know how it was evolved. I would say it has been in use for forty or fifty years. I don't know that from my own knowledge, but from hearsay.

Q. Is there a trade name for the so-called C seam coal?

A. We generally refer to it as Berwind's Standard C prime coal, if that may be called a trade name.

Q. There is no name that is comparable to Eureka on it?

A. No, there is not.

Mr. Lyons: Do you happen, Mr. Seymour, to know whether the Berwind-White Company was the first company in the field on B seam?

The Witness: I don't know that.

Mr. Lyons: I guess that closes the case.

By Mr. Herman:

Q. What are the methods of advertising your coal?

A. We advertise in the coal journals. All other advertising by Berwind-White Coal Mining Company is done by the salesmen.

Q. Do you send out circulars to your various customers?

A. No, sir.

Mr. Lyons: Isn't your coal your best advertisement?

The Witness: Our coal is our best advertisement.

By Mr. Baum:

Q. Do you own the railroad cars between the mines and Harsimus Pier that run between those points?

A. We do.

[fol. 140] Q. Do you pay rental to the Pennsylvania Railroad for the use of the trackage?

A. I don't know.

Q. Do you know the arrangement with the Pennsylvania?

A. I do not know the arrangement with the Pennsylvania.

Q. You own those cars?

A. That is correct.

Q. And the coal is loaded in your cars?

A. That is right.

Q. Then when the coal arrives at the pier it is loaded onto your barges?

A. That is correct.

Q. Do you own those barges?

A. We own the majority of them. Some of the barges are chartered at times.

Q. In other words, the vehicle of transportation from the mine to the plant of the customer is your vehicle?

A. In general practice, aside from what barges we may charter to supplement our own.

Mr. Herman: Case is closed. Decision reserved.

[fol. 141] **Taxpayer's Exhibits Referred to in Document 3, Annexed to Return**

EXHIBIT 1

This exhibit is omitted. It is a power of attorney. See stipulation at page 195 hereof.

EXHIBIT 2

This exhibit is printed as Exhibit I, annexed to petition, at page 20 hereof.

EXHIBIT 3

This exhibit is printed as Exhibit II, annexed to petition, at page 28 hereof.

[fol. 142]

EXHIBIT 4

The Berwind-White Coal Mining Company

Summary of Sales to Customers in Connection with Whom Sales Tax Has Been Assessed for the Period from December 10, 1934, to December 31, 1935

	Dec. 10, 1934 to Feb. 28, 1935	Mar. 1, 1935 to May 31, 1935	June 1, 1935 to Aug. 31, 1935	Sept. 1, 1935 to Dec. 31, 1935	Total
Term Contracts:					
All America Cables, Inc	$ 1,880.46	——	$ 2,713.06	$ 2,236.61	$ 6,830.13
Arbuckle Brothers	1,826.34	$ 6,231.62	4,199.99	8,545.18	20,803.13
Brooklyn Edison Company	536,347.34	602,352.89	513,013.56	815,451.04	2,467,164.83
Clyde & Mallory Lines	4,074.92	4,429.46	4,454.44	6,749.44	19,708.26
L. A. Dreyfus Company	1,569.54	1,388.24	1,706.01	1,469.60	6,133.39
French Line	3,278.60	2,890.00	2,218.72	3,900.74	12,288.06
Interborough Rapid Transit	512,301.32	466,398.97	505,756.56	553,747.43	2,038,204.28
International Mercantile Marine	4,249.62	1,634.94	——	3,316.59	9,201.15
*New England Steamship Company	35,036.02	13,993.85	——	——	49,029.87
New York Edison Company	394,866.77	233,369.03	321,282.84	678,954.03	1,628,472.67
New York & Porto Rico Steamship Company	334.80	——	——	——	334.80
Ocean Dominion Steamship Company	——	——	——	1,023.76	1,023.76
Spanish Line	16,399.26	10,111.50	13,979.64	40,758.90	81,249.30
United Electric Light & Power Company	96,719.15	226,671.20	86,246.27	——	409,636.62
Williamsburgh Power Plant Corporation	149,839.20	163,634.26	150,023.82	232,903.68	696,400.96
Total Term Contracts	$1,758,723.34	$1,733,105.96	$1,605,594.91	$2,349,057.00	$7,446,481.21
Spot Contracts:					
Austin, Nichols & Co. (f. o. b. mines)	$ 2,180.27	$ 361.58	$ 239.41	$ 1,520.90	$ 4,302.16
Caddell Drydock & Repair Company	529.15	1,036.39	——	720.52	2,286.06
*New England Steamship Company	——	23,424.36	53,958.13	——	77,382.49
North Atlantic & Gulf Steamship Company	1,863.53	——	——	——	1,863.53
Pioneer Terminal Corporation	3,057.84	——	——	——	3,057.84
U. S. Navigation Company	——	2,566.80	——	——	2,566.80
Total Spot Contracts	$ 7,630.79	$ 27,389.13	$ 54,197.54	$ 2,241.42	$ 91,458.88
Together	$1,766,354.13	$1,760,495.09	$1,659,792.45	$2,351,298.42	$7,537,940.09

* Term Contract expired March 31, 1935.

[fol. 143] EXHIBIT 5

The Receivers of the Interborough Rapid Transit Company may require during the twelve months, beginning April 1, 1934, approximately 800,000 gross tons of semi-bituminous run-of-mine coal.

Bids are invited for the furnishing of any part of the supply.

Successful bidders will be required to execute contracts specifying character and quality of coal, and penalty for failure to meet standard.

Copy of form of contract, or any further information, may be had upon application at the office of the Receivers.

Bids must be sealed and addressed to—

Receivers of Interborough Rapid Transit Company,
Room 1209, 165 Broadway, New York City

marked "Bids for Coal Supply," and must be received there not later than noon, Thursday, March 1, 1934.

The Receivers reserve the right to reject any or all bids, or to award to any bidder, any lesser portion of the tonnage offered.

Victor J. Dowling, Thomas E. Murray, Jr., Receivers
of Interborough Rapid Transit Company.

New York, February 17, 1934.

To—Berwind White Coal Mining Company, #1 Broadway, New York City.

[fol. 144] It is to be understood that contracts are to be considered as "requirement" agreements and that tonnages expressed are estimates.

All bids must be on the basis of gross ton, delivered free alongside the Company's power house docks at 58th Street and North River, and 74th Street and East River, respectively, and must be on the basis of coal equal to the Company's standard, subject to deductions as specified in contract. Delivery to be in the manner specified in form of agreement hereto attached.

Bids must be accompanied by an average or typical analysis of the coal proposed to be furnished, and must also specify the name of the producing mine, its location, latest yearly output, shipping point and route to New York.

Bids will be considered from only bonafide coal mine operators, or their authorized sales agents, provided, however, written authorization accompanies bid.

Each bid must be accompanied by a sworn statement that such bid is made without any connection with any other person, firm or corporation making a bid for the same purpose and is in all respects fair and without collusion or fraud.

Successful bidders will be required to deposit surety bond conditioned on faithful performance of all terms of the contract in an amount equal to 25% of the amount of the contract, but not less than $50,000 nor more than $100,000, and each bid must be accompanied by written evidence from a satisfactory surety company of willingness to furnish such bond.

[fol. 145] EXHIBIT 6

The Berwind-White Coal Mining Company, New York

February 28, 1934.

Receivers of the Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Gentlemen:

We beg to acknowledge and thank you for your letter of February 17th, enclosing specifications covering the conditions governing bids on your coal requirements at New York over a period of one year commencing April 1st, 1934, and expiring March 31st, 1935.

We have submitted these specifications to the Code Authority of Eastern Sub-Division of Division No. 1, under whose jurisdiction we operate, and have been advised by them that certain clauses do not conform to the standard terms of sale as authorized by them, and, further, that they so notified you in detail under date of February 26th.

It is, therefore, understood that this bid is subject to modification of your specifications, in conformity with the letter dated February 26th, referred to above.

For four hundred thousand (400,000) gross tons at a price of $5.232 per gross ton.

Delivery conditions similar to last year.

Coal to be Berwind's Eureka.

[fol. 146] You have asked for the analysis of our coal, and we beg to submit as follows the average analysis of the coal supplied to you last year:

Volatile	16.60	Sulphur	1.35 (dry basis)
Fixed Carbon	76.64	B. T. U.	14,673 " "
Ash	6.76	F. P. A.	2,700° F.
	100.00%	Moisture	3.51

Our Eureka Coal is produced from Mines Nos. 35, 36, 37, 40, 42 and Maryland Shaft, located at Windber, Somerset County, Pennsylvania.

The output of our Pennsylvania Operations for 1933 was approximately 2,200,000 tons.

This coal is transported from our mines to New York entirely over the Pennsylvania Railroad,—the shipping point being Windber, Pennsylvania.

Trusting that this proposal will meet with your entire satisfaction, we remain

Very truly yours, Charles E. Dunlap, President.

CED:C.

[fol. 147] EXHIBIT 7

Interborough Rapid Transit Company
165 Broadway
New York

Thomas E. Murray, Jr.,
Receiver.

March 27th, 1934.

The Berwind-White Coal Mining Company,
1 Broadway,
New York City.

DEAR SIRS:

This will confirm oral advice that you have been awarded a contract for 400,000 gross tons of R.O.M. Bituminous Coal of the character specified in your proposition of February 28th, 1934, at a price of $5.232 per ton, as part of the Receiver's requirements for the year beginning April 1, 1934.

It is understood that formal contract, substantially as already submitted to you but modified as the result of the letter from the Chairman of the Code Authority of your

District, dated February 26th, will be executed as soon as the award has been approved by the Transit Commission.

Very truly yours,

Thomas E. Murray, Jr., Receiver.

[fol. 148] EXHIBIT 8

Interborough Standard "A" Coal

Agreement entered into at New York City this 1st day of April, 1934, whereby the Berwind-White Coal Mining Company, a corporation of the State of Pennsylvania, (hereinafter referred to as the Seller) agrees to sell, and Thomas E. Murray, Jr., as Receiver of Interborough Rapid Transit Company, of No. 165 Broadway, New York City (hereinafter referred to as the Buyer) agrees to buy, during the twelve months beginning April 1, 1934, and ending March 31, 1935, a part of the Buyer's estimated requirements of coal in the allotted amount of 400,000 tons of 2240 pounds, free-burning R/M coal of the standard of quality hereinafter specified, to be known as "Interborough Standard 'A' Coal," with the option to the Buyer to increase or decrease the allotment 20%; and it is further understood that this contract is based upon the estimated requirements of the Buyer and that if during the term of this contract the requirements of the Buyer shall be materially changed due to the fact that the Buyer shall cease to supply power to the New York Railways Company and other railroads, or shall cease to operate the 74th Street (East River) power station, then the allotment of 400,000 tons under this contract shall from such time be reduced in proportion as the total requirements of the Buyer shall be reduced; less such amount as the Seller is unable to deliver or the buyer is unable to receive on account of the following contingencies or causes affecting the production, shipment, delivery or receipt of coal to be shipped under this contract, viz.: strikes, [fol. 149] lockouts, confiscation by railroads, labor agitations, accidents, car shortage, contingencies of transportation or navigation, action of any governmental agencies or any cause beyond the control of either party of this contract except as herein expressly provided.

Shipments to be made as follows:

To Thomas E. Murray, Jr., Receiver

Interborough Rapid Transit Company, at New York, N. Y., and in as near equal monthly instalments as possible (due allowance being made for the seasonal variation of the Buyer's requirements) during the period beginning April 1, 1934, and ending March 31, 1935, subject to the above-mentioned contingencies and causes, and the following terms and conditions:

(1) The Seller reserves the right to incur obligations for the sale of coal from its mines during all periods when deliveries required under outstanding obligations, plus requirements for Seller's coke ovens, do not in the aggregate, exceed the physical capacity of said mines. In the event of contingencies or causes restricting the production or shipment from the Seller's mines, the Buyer shall be entitled to receive hereunder in any one month, only that proportion of the tonnage herein contracted as actual total shipments in available coal car equipment bear to (a) rated capacity of said mines (as determined by Railroad Car Distribution Rules) or to (b) physical capacity of said mines in case rated capacity shall have been reduced by contingencies or causes of the character herein referred to; and where contingencies or causes affecting delivery of coal, affect deliveries to other [fol. 150] Seller's customers, as deliveries to Buyer, the Seller agrees to pro-rate available facilities for delivery among all of its customers so affected, including Buyer, in proportion to the amount of coal that each is entitled to receive.

(2) Subject to the foregoing stipulation that shipments shall be in as nearly equal monthly instalments as possible, with due allowance for seasonal variation of the Buyer's requirements, the Superintendent of Motive Power of the Buyer shall prepare and send to the Seller weekly a schedule of deliveries for the next ensuing seven days.

Should the Seller, for any reason, fail to deliver coal in accordance with the aforesaid schedule, the Buyer will be at liberty to buy coal in the open market. Unless such failure by the Seller to make deliveries according to schedules are due to the causes beyond his control hereinbefore mentioned, the Seller shall be considered in default and the Seller shall make good to the Buyer any difference there may be between the price paid by the Buyer for said coal in

the open market and the price the Buyer would have paid to the Seller had the coal been delivered according to Schedule, or, said differences may be deducted from any money then due or there-after to become due to the Seller under this agreement.

Failure to ship or receive coal, for any reason whatsoever, to the full extent of the monthly instalment in any one month, shall not require (or give the option to) either party to ship or receive in subsequent months the amount of coal not shipped or received during the month in question.

(3) Price from April 1, 1934 to and including March 31, 1935, $5.232 per gross ton of 2240 pounds, free alongside [fol. 151] at 59th Street (North River) and 74th Street (East River) power stations of Buyer, except as the price may be modified as hereinafter provided. Payment for coal delivered during each month shall be made on or before the 20th day of the succeeding month.

(4) The Seller shall at all times assume all responsibility and liability for the lighter and the coal contained therein, and shall furnish all ropes necessary to secure the lighter at the Buyer's docks. The Buyer will, however, furnish the labor necessary at the dock to tie up or shift the lighters, but the men performing such labor shall act only under the direction of the lighter captain, the Seller hereby agreeing to assume all responsibility for the acts of the Captain of the lighter.

(5) All coal shall be delivered in self-trimming lighters similar to those known as "State Boats," which must contain at least 700 tons. Should any lighter contain less than 700 tons, a deduction of fifteen cents (15¢) per ton will be made from the price, in addition to any other deduction provided herein. Should coal be delivered in a lighter which, in the judgment of the Superintendent of Motive Power, for the Buyer, is not self-trimming, a deduction of fifteen cents (15¢) per ton will be made from the price, in addition to any other deduction provided herein. The aforesaid deductions shall be made by the Buyer from the moneys due the Seller hereunder as such amounts become due.

(6) The price named in this contract is based on the present railroad rates and vessel rates and taxes imposed by the United States Government, for or in respect of move-

ment from mines to points named in Clause (3) hereof. [fol. 152] Should there be any increase or decrease in any of such rates or taxes, during the life of this contract, the price of any tonnage to be delivered hereunder shall, on the effective date of each such change be correspondingly increased or decreased. The price named in this contract is also subject to increase or decrease to the extent that the expenses of the Seller are increased or decreased: (1) by any change in the scale of wages in effect at the mines of the Seller at the date hereof; (2) by any State or Federal legislation and/or regulation including manufacturers, sales and excise taxes.

(7) Vessel's bill-of-lading weight, as determined by Railroad Company over whose piers coal is dumped, to govern all settlements.

(8) Failure of Buyer to comply with this contract, shall give the Seller the right to cancel this contract, but waiver of this right, in any instance, shall not prevent the subsequent exercise of it by the Seller or prejudice the Seller's claim for Damages resulting from such default of Buyer.

(9) The measure of damages in the case of default by either party shall be limited to the difference between the market price and the contract price at the time and place of delivery.

(10) The provisions, terms, or conditions of this contract cannot, at any time, be varied or modified, except with the express approval (evidenced by letter or telegram) of the officer of the Seller originally approving this contract, or his successor in office.

(11) The Seller agrees to make such further reduction in the price of the coal supplied by it as may be necessary to meet the minimum price at which coal of the same quality is supplied by it on contract to any other traction or public utility customer in the District. Any reduction to which the Buyer may be entitled shall be computed from the date of the [fol. 153] new contract carrying the lower price, provided, however, that during the continuance of the Eastern Bituminous Code Authority, or any successor authority, the price of coal delivered hereunder shall not by reason of such reduction be less than the code prices fixed and established by said authority applicable to the Seller, for the time being, for

coal at the point of delivery herein specified of the character and quality hereby contracted for.

(12) Coal must be of good steam, coking, run of mine, free-burning, semi-bituminous coal, free from all dirt and excessive dust, a dry sample of which will approximate the "Interborough Standard 'A' Coal" in heat value and analysis, as follows:

Carbon	Volatile Matter	Ash	B.T.U.'s	Sulphur
73.25	20.	6.75	14,641	1.50

Samples of coal shall be selected for analysis and analyses shall be made in accordance with the provisions of the schedule hereto annexed and made part of this contract and marked:

"Method of sampling and analyzing for "Interborough Standard 'A' Coal'."

(13) It is expressly understood and agreed that the chemical analysis and heat value of coal are not sufficient criteria for determining whether the Seller's coal has the necessary combustion characteristics to meet the Buyer's requirements. The combustion characteristics of any coal, in its relation to boiler capacity, firing, etc., can be determined only by experience under actual operating conditions. Should the Seller's coal not have the combustion characteristics required to produce under actual operating conditions the same result as is being obtained with coal now in use having the same approximate chemical analysis, the Buyer [fol. 154] may refuse to receive the Seller's Coal during any period within the term of this agreement, or to reject any lighter or lighters of coal to be delivered by the Seller. It is agreed that the Seller shall have the right to investigate the plant conditions requiring the rejection of such coal, but the decision of the Superintendent of Motive Power for the Buyer is to be final with respect to such rejection.

(14) Simultaneously with the execution of this contract, and before it shall be or become binding upon the Buyer, the Seller shall deliver to the Buyer a bond in the form attached hereto and made a part hereof, executed by the Seller and a surety, or sureties, approved by the Buyer, in the sum of $100,000.00 dollars as security for the faithful performance of this contract by the Seller.

(15) This contract is entered into, subject to the approval of the Transit Commission of the State of New York.

In Witness Whereof, the parties hereto have caused this agreement to be executed by their proper officers thereunto duly authorized, and their respective corporate seals to be affixed, the day and year first above written.

Thomas E. Murray, Jr., as Receiver of Interborough Rapid Transit Company. By Geo. Keegan, General Manager for the Receiver, Berwind-White Coal Mining Company. By Charles E. Dunlap, President. (Seal.)

Approved as to form V.U. 4/13/34.

Attest: O. M. Hinton A. Secretary

[fol. 155] Method of Sampling and Analyzing for "Interborough Standard 'A' Coal"

The words "Company" and "Contractor" as used herein, refer to the "Buyer" and "Seller", respectively, as defined in the foregoing contract.

Method of Sampling Coal for Analysis.—A small quantity or sample of coal will be taken automatically from each alternate weighing hopper while the hopper is being dumped and the lighter being unloaded, and allowed to drop into a receptacle, until about 200 pounds have accumulated. This bulk of coal will be crushed and quartered successively to about ten pounds and placed in a box. The receptacle will then be filled again when the same operation of crushing and quartering will be continued until the lighter has been unloaded. The contents of the box will then be crushed and quartered down to about two pounds, which, after being pulverized in a mill, will be taken for chemical analysis. This average sample of coal will be labelled and held for one week after the unloading of the lighter. The sample will be analyzed as soon as possible after being taken. No other sample will be recognized.

Analysis.—Analysis of dry sample taken from average sample will be made by the Company's chemist under the supervision of the Superintendent of Motive Power. Should

the Contractor question the results of the Company's test (a copy of which will be mailed to him), the Company will, if requested by the Contractor within three (3) days after copy of test has been mailed to him, forward sufficient quantity of the average sample taken from each weighing hopper to any laboratory in the City of New York which may be agreed upon by the Superintendent of Motive Power and Contractor, and have said sample analyzed by it and the [fol. 156] results obtained from this second analysis will be considered as final and conclusive. In case the questioned values as obtained in the Company's analysis shall be found by the second analysis to be 2 per cent, or less in error, then the cost of said second analysis shall be borne by the Contractor, but if the disputed values shall be found to be more than 2 per cent, in error, then the cost of second analysis shall be borne by the Company.

Should there be no question raised by the Contractor within the three (3) days specified, as to the values in the first analysis the average sample of coal will be destroyed at the end of seven (7) days from date of discharge of coal from lighter. Should a second analysis be made of coal taken from any lighter as herein provided, then the calculation to be made as set forth in paragraph under "deductions" will be based on the results as obtained from the second analysis.

All analyses will be made in accordance with the standard adopted by the American Society for Testing Materials with the exception of the volatile matter which will be determined by heating for 7 minutes in covered 30 gram platinum crucible.

The method of determination of the heat value of the coal will be by the Atwater-Mahler Bomb Calorimeter, standardized against standard samples of known heat value, either Napthaline, Benzoic Acid or Sucrose as obtained from the National Bureau of Standards at Washington.

(Acknowledged on the 4th day of March, 1935, by Charles E. Dunlap, and on the 12th day of March 1935, by George Keegan. Bond of United States Guarantee Company attached.)

[fol. 157] EXHIBIT 9

The Berwind-White Coal Mining Company, New York

January 3, 1935.

Mr. Thomas E. Murray, Jr., Receiver, Interborough Rapid Transit Company, 165 Broadway, New York, N. Y.

MY DEAR MR. MURRAY:

Referring to your inquiry of to-day, we herewith offer to contract with you for your coal requirements for the year beginning April 1st, 1935, and terminating March 31st, 1936, at the following prices:

$5.512—between April 1st, 1935, and June 16th, 1935, inclusive;
$5.288—between June 17th, 1935, and August 31, 1935, inclusive;
$5.40 —between September 1st, 1935, and March 31st, 1936, inclusive.

The above prices are per gross ton delivered alongside your Dock within the Harbor Limits.

The coal to be supplied will be Berwind's Standard Eureka Run-of-Mine, and the quantity offered at the above prices will be a maximum of 400,000 gross tons, 10% more or less.

[fol. 158] All other general conditions as outlined in our current contracts are to apply, in addition to which the following two clauses will be inserted:

"Special Conditions: If, during the life of this contract, the Code price for the kind and grade of coal covered by this contract be reduced, then such reduced price shall be substituted for the contract price on all coal delivered hereunder while such reduced price is in effect.

Should the Coal Code and its resultant association be abandoned, the parties to this contract agree to and, on reasonable notice, will confer as to a fair market price for the coal to be delivered. If an agreement cannot be reached as to the price on coal to be delivered, the contract may be cancelled on thirty (30) days' notice."

Very truly yours, Charles E. Dunlap, President.

CED:C.

[fol. 159] EXHIBIT 10

Thomas E. Murray, Jr., Receiver Interborough Rapid Transit Company,

No. 165 Broadway, New York

George Keegan, General Manager for Receiver.

January 4, 1935.

The Berwind-White Coal Mining Co., 1 Broadway, New York City.

Attention of Mr. Charles E. Dunlap, President

DEAR SIRS:

In response to your letter addressed to Receiver Thomas E. Murray, Jr., under date of January 3rd, 1935, submitting a proposition to supply a portion of our coal requirements for the year ensuing April 1, 1935, and in confirmation of your conversation with Mr. Starbard this afternoon, I am authorized by the Receiver to accept, subject to the approval of the Transit Commission, your proposal for 75% to 100% of the quantity covered by your present contract, the exact quantity to be determined later, upon the same terms and conditions as contained in our present contract.

It is understood that if during the life of this contract the Coal Code price for the kind and grade of coal covered by this contract shall be reduced so as to establish a price less than the price quoted under this contract, then such re-[fol. 160] duced price shall be substituted for the contract price on all coal delivered under this contract while such reduced price is in effect; and, further, that if the Coal Code shall be abandoned, then the Receiver may, upon thirty days' written notice, cancel this contract.

Very truly yours, Geo. Keegan, General Manager for Receiver.

EXHIBIT 11

This exhibit is omitted. It is a contract between petitioner and Thomas E. Murray, Jr., as Receiver of Interborough Rapid Transit Company, similar to the contract printed as Exhibit 8 at page 148 hereof, but covering the period beginning April 1, 1935 and ending March 31, 1936. See stipulation at page 195 hereof.

[fol. 161] EXHIBIT 12

Code Contract Number: N. Y. 3-34.

Agreement for the Sale and Purchase of Coal

Parties

Agreement made at the City of New York this seventh day of February 1934, by and between The Berwind-White Coal Mining Company of New York City, N. Y. (hereinafter referred to as the Seller) and The New York Edison Company of No. 4 Irving Place, New York City (hereinafter referred to as the Buyer):

Consideration and Quantity

(1) In consideration of the following terms and conditions, the Seller agrees to sell and deliver and the Buyer to buy and accept, alongside Buyer's stations in New York Harbor, approximately two hundred and twenty thousand (220,000) gross tons of Standard Eureka run of mine and one hundred and eighty thousand (180,000) gross tons of 2" nut and slack B seam bituminous coals from the Seller's mines in Cambria and Somerset Counties, Pa.

Quality

(2) It is understood that this coal is to be used by the Buyer in the generating of electrical current for public distribution for light, heat and power purposes, and as the quality of the coal is an essential consideration, it is agreed that the analysis of each cargo of coal delivered under this contract shall be within the following specifications:

[fol. 162]

Dry Basis	
Volatile	not to exceed 20%
Fixed Carbon	to be in excess of 72.5%
Ash	not to exceed 7.5%
Sulphur	not to exceed 1.75%
B. T. U.'s	to be in excess of 14500
Fusibility	to be in excess of 2500° F.

It is further mutually agreed that the coal delivered hereunder shall also meet the operating requirements of the Buyer's Engineers at each of the stations where it is to be consumed.

Delivery

(3) Delivery to be made during the year ending March 31, 1935 of the run of mine coal, at the rates approximately, of 3200 tons a week during the months of April, May, June and July: 4200 tons a week during the months of August, September and October: 5200 tons a week during the months of November, December, January and February and 4200 tons a week during the month of March.

Delivery of the 2" nut and slack to be made at the rates approximately of 2100 tons a week during the months of April, May and June; 3800 tons a week during the months of July and August; 4700 tons a week during the months of September and October; 4000 tons a week during the months of November, December, January and February; 2200 tons a week during the month of March.

It is also mutually agreed that the Buyer may, at any time, upon 15 days' notice in writing to the Seller, increase or decrease any or all of the deliveries thereafter to be made hereunder by an amount not to exceed 20%.

[fol. 163] Such delivery and acceptance to be subject to strikes, accidents, car shortage and other causes beyond the control of either party. Over-shipment during any week shall not be considered to be delivery on account of any other week without the approval of the Buyer.

In the event of the Seller being unable to make the full weekly deliveries because of strikes or other causes previously specified, the Seller agrees that the amount of coal delivered under this contract shall be at least equal (in the per cent that the amount delivered bears to the contract requirement) to deliveries to any other of the Seller's customers, but that the full amount of coal shall be delivered weekly under this contract before there are any deliveries on account of the Seller's "spot" orders.

It is mutually understood that, in the event the Seller is unable at any time to supply the quantity of the size of coal specified in this contract, it will substitute another size from the same mine or mines to make up the contract tonnage.

Consignment

(4) Shipments are to be consigned to the Buyer alongside its power stations, New York City, as directed.

Price

(5) The price to be paid for run of mine coal delivered under this contract shall be Five Dollars and Twelve Cents ($5.12) a gross ton alongside Buyer's stations at 38th to 40th Streets and East River, and Five Dollars and Seventeen Cents ($5.17) a gross ton alongside Buyer's stations at 132nd Street and East River; and for 2" nut and slack [fol. 164] coal delivered under this contract the price to be paid shall be Four Dollars and Ninety-five Cents ($4.95) a gross ton alongside Buyer's stations at 38th to 40th Streets and East River and Five Dollars ($5.00) a gross ton alongside Buyer's stations at 132nd Street and East River, such delivery to be made in barges of types and sizes required by the Buyer.

These prices are based on the present rates of Wages paid to miners and day laborers at the above mine or mines of the Seller and upon the present railroad freight rates from these mines to New York Tidewater; and in the event of change in any of these rates of wages affecting the cost of production of coal delivered hereunder, or change in such railroad freight rates, there shall be a corresponding change in the above prices.

It is mutually agreed that, in the event of any change in the present agreement between the Seller and its mine workers affecting the number of hours worked in a week and the effect of such change on the cost of producing coal in the district in which the above mine is located, the above price will be changed to cover such increase or decrease in the cost in the amount approved by the Code Authority.

It is also mutually agreed that, if the Code Authority shall reduce the price of coal of the above grade to a price lower than that herein provided, such lower price shall be the price to be paid for coal delivered hereunder while such lower price is in effect.

If at any time during the period of this contract the Seller shall sell any coal of the same grade as that to be delivered hereunder from the above mines on contract at a price less than that specified herein, the Buyer shall have [fol. 165] the right to cancel the unfilled portion of this contract, unless the Seller shall agree, during the period the lower price is in effect, to reduce the price of coal delivered hereunder to such lower price.

Terms of Payment

(6) The Buyer agrees to make payment on the 15th of each month for deliveries made during the preceding calendar month, and the Seller agrees to render bills as promptly as possible.

It is mutually agreed that railroad weights shall govern all settlements.

The Seller agrees to furnish the Buyer a statement of the numbers of the railroad cars that go to make up each boat cargo, the size of coal contained in each car and the mine from which it was shipped.

Federal and State Legislation

(7) If any law becomes effective after the date hereof, imposing a sales tax payable by the Seller, because of sales, deliveries or orders hereunder the Buyer shall pay the Seller so much of such tax as applies to the deliveries hereunder.

(8) This agreement shall be binding upon and enure to the benefit of the parties hereto, their successors and assigns.

In Witness Whereof the parties hereto have signed and delivered this agreement the day and year first above written.

(Executed by Charles E. Dunlap, for Berwind-White, and by W. W. Erwin, for New York Edison.)

[fol. 166] Exhibits 13-16

These exhibits are omitted. (See stipulation at page 195 hereof. Exhibits 14 to 16 inclusive are contracts between petitioner and the companies listed below, similar to the contract printed as Exhibit 12 at page 161 hereof, but covering the following periods:

Exhibit No.	Company	Period Covered
13	New York Edison Company	4/ 1/35—6/16/35
14	New York Edison Company	6/17/35—3/31/36
15	United Electric Light & Power Company	4/ 1/35—6/16/35
16	United Electric Light & Power Company	6/17/35—3/31/36

EXHIBIT 17

Contract No. NY 2-34

Agreement made at the City of New York this sixth day of February 1934, by and between the Berwind-White Coal Mining Company, of the City of New York, hereinafter referred to as the Seller, and the Brooklyn Edison Company, Inc. of the City of New York, hereinafter referred to as the Buyer.

1. In consideration of the following terms and conditions, the Seller agrees to sell and deliver, and the Buyer to buy and accept, alongside its power plants approximately four hundred and fifty thousand to five hundred and fifty thousand (450,000/550,000) net tons of bituminous coal from April 1-1934 to March 31-1935.

Grade: 450,000 to 550,000 Net Tons, Berwind's Standard Eureka run of mine coal from the Eureka mines located in Cambria and Somerset Counties at or near Windber, Pa. Prior to making this contract the Seller delivered to the [fol. 167] Buyer during March 1932 a cargo of this coal to be tested as to quality for the Buyer's needs and purpose. It is understood by the Seller that the coal to be delivered under this contract shall be generally equal in quality to the coal so tested.

Shipments: The Buyer will give notice each month of the tonnage desired during the succeeding month which will be within the limits of 1/12 of the maximum and minimum annual requirements stipulated above—unless otherwise mutually agreed—and deliveries shall be made to meet these needs.

Weight: Net weights, as determined by the railroad scales nearest loading point, shall govern all settlements.

Price: Five dollars and twelve cents ($5.12) per gross ton alongside Buyer's power plants.

Terms of Payment: Bills for shipments in any month shall be presented by the Seller not later than the fifth day of the following month, and be paid by the Buyer within fifteen days after such presentation.

Expiration: This contract expires March 31, 1935.

2. It is understood and agreed that the price named in this contract is based upon the present wages and freight rates. Should there be any general change in cost, caused by tax legislation or by changes in wages, or by railway

rates, the price herein stated will be increased, or decreased accordingly by the amount that such cost is increased or [fol. 168] decreased above or below the costs on which this contract price has been determined; or if this grade of coal during the period of this contract is contracted under similar circumstances by the Seller to any other buyer in the New York Metropolitan District at a lower price, the price herein stated will thereafter be decreased accordingly.

3. Delivery and acceptance of coal hereunder shall be subject to strikes, accidents and other causes beyond the control of either party, provided that prompt written notice of the existence of such strikes, accidents or other causes is given, and in case of any interruption from such sources, the Seller agrees to make up the deliveries that would have been required hereunder during the period of such interruption only on written request from the Buyer.

In witness whereof the parties hereto have signed and delivered this agreement the day and year first above written.

(Executed by W. P. Holcombe, for Brooklyn Edison, and by Charles E. Dunlap for Berwind-White.)

EXHIBIT 18

This exhibit is omitted. It is a contract between petitioner and Brooklyn Edison Company, Inc. similar to the contract printed as Exhibit 17 at page 166 hereof, but covering the period from April 1, 1935 to March 31, 1936. See stipulation at page 195 hereof.

[fol. 169] EXHIBIT 19

The Berwind-White Coal Mining Company

Commercial Trust Building, Philadelphia, Pa.

Agreement made and entered into at the City of New York, New York, this 26th day of May, 1934, whereby The Berwind-White Coal Mining Company of Philadelphia, Pennsylvania, hereinafter called the "Seller", agrees to sell and deliver, and the Williamsburgh Power Plant Corpo-

ration of Brooklyn, New York, hereinafter called the "Buyer", agrees to buy and accept, bituminous coal of the quantity and quality, at the prices and on the terms and conditions hereinafter set forth.

Kind of Coal: Berwind's Standard Eureka Run-of-Mine ("B" Seam) Coal, from the Seller's Mines, located in Cambria and Somerset Counties, Pennsylvania.

Mines: Eureka Nos. 35, 36, 37, 40, 42 and Maryland Shaft Mine, owned and operated by The Berwind-White Coal Mining Company.

Quantity: One Hundred Thousand (100,000) gross tons, ten percent (10%) more or less, at the option of the Buyer.

Quality: The quality of Eureka Coal will have substantially the same combustion characteristics as that furnished for the past year, and will conform to the following specifications:

Fixed Carbon	at least	73.25%
Volatile Matter	Not to exceed	20.00%
Ash	" " "	6.75%
Sulphur	" " "	1.50%
B. T. U.	at least	14,641

It is understood that this coal is to be used by the Buyer in the generating of electrical current for light, heat and power purposes.

[fol. 170] Delivery: Deliveries are to be made during the year commencing June 1st, 1934, and ending May 31st, 1935, in approximately equal monthly quantities. Delivery to be subject to events of war, strikes, riots, lock-outs, interruption of transportation; whether general or partial, or other causes beyond our control, affecting the working of this contract, and the Seller will be relieved from all obligation during such time unless changed by mutual agreement.

Consignment: Shipments are to be consigned and delivered to the Buyer alongside the Williamsburgh Power Station, Brooklyn, New York, as directed.

Price: $5.512 per gross ton of 2,240-lbs. alongside Williamsburgh Power Station, Brooklyn, New York.

The price stated herein shall be increased or decreased, as the case may be, by the amount by which the cost of production of the coal shipped hereunder is increased or decreased by any one or more of the following: (1) Any change in the present agreements with mine employees as to wages, provided such change is part of a general change in the

rates of mine employees in the district in which the mines from which the said coal is shipped are located; (2) Any State or Federal tax on coal or on the mining or sale thereof; (3) Any change in the present State or Federal legislation operating to limit the hours of labor; (4) Any other State or Federal rule or regulation.

Whenever any change in the cost of production of the coal shipped hereunder is caused as above provided, the Seller shall promptly present to the Buyer the details with respect thereto and shall thereafter either increase or decrease all invoices relating to said coal by the amount of such change [fol. 171] or, in case any coal whose cost of production has been changed by any of said causes has been shipped hereunder under an invoice that does not reflect such change, issue to the Buyer a debit or credit memorandum thereof.

In the event that the present railroad freight rate of Two Dollars and Seventy-Two Cents ($2.72) per gross ton is changed, the Seller shall receive the benefit of any advances and the Buyer of any reductions therein.

If, during the life of this contract, the Code price for the grade of coal covered by this contract be reduced, then such reduced price shall be substituted for the contract price on all coal delivered hereunder while such reduced price is in effect, but any increase or increases in the minimum Code price now in force shall not increase the contract price hereinabove set forth.

Terms of Payment: The Buyer agrees to make payments on or before the twentieth day of each month for deliveries made during the preceding calendar month, and the Seller agrees to render bills as promptly as possible.

It is mutually agreed that railroad weights shall govern all settlements.

In Witness Whereof, the parties hereto have signed and delivered this agreement the day and year first above written.

The Berwind-White Coal Mining Company, by Charles Dunlap, President.

Accepted:

Williamsburgh Power Plant Corporation, by Geo. W. Jones, Vice President.

WHS

9—475.

[fol. 172] EXHIBIT 20

This exhibit is omitted. It is a contract between petitioner and Williamsburgh Power Plant Corporation, similar to the contract printed as Exhibit 19 at page 169 hereof, but covering the period commencing June 1, 1935 and ending May 31, 1936. See Stipulation at page 195 hereof.

EXHIBIT 21

Copy Contract No. NY 509-34.

The Berwind-White Coal Mining Company

Commercial Trust Building, Philadelphia, Penna.

Agreement made and entered into this sixth day of March, 1934, whereby the Berwind-White Coal Mining Company of Philadelphia, Pennsylvania, agrees to sell and the New England Steamship Company of New Haven, Connecticut agrees to buy, f.o.b. cars Harsimus Pier, Jersey City, New Jersey, approximately Sixty Thousand (60,000) gross tons of Berwind's Eureka coal to be used for bunkering their own vessels, less such amount as the said coal company is unable to ship or the New England Steamship Company is unable to receive, on account of any strike, accident, contingency of transportation, or cause or causes beyond the control of either party, affecting the mining, shipment, transportation, delivery or receipt of coal to be shipped under this agreement.

Kind of Coal: Berwind's Eureka R M coal.

[fol. 173] Quantity: Approximately Fifty Percent (50%) of Buyer's New York Harbor requirements, estimated at about Fifty Thousand (50,000) gross tons. One Hundred Percent (100%) of Buyer's requirements for consignment to New Bedford, Massachusetts, estimated at about Ten Thousand (10,000) net tons.

Contract Period: From April 1, 1934 to March 31, 1935, inclusive.

Price: $5.05 per gross ton f. o. b. cars Harsimus Pier, Jersey City, N. J.

The price or prices named herein shall be increased or decreased to the extent that the expenses of the Seller are increased or decreased; (1) by any change in the scale of wages

in effect at the mines of the seller at the date hereof; (2) by any State or Federal legislation and/or regulation including manufacturers, sales and excise taxes; (3) by any change in the freight rates in effect at the date hereof.

In the event that at any time prior to the expiration of this agreement the Bituminous Coal Code govering the bituminous coal industry is discontinued and/or in the event that the minimum price fixing provisions of such Code are suspended or discontinued and/or in the event that the Bituminous Coal Code permits the substitution of a lower price or prices for the sale of the product provided for in this agreement, then and in any such event the Seller agrees that it will reduce the prices herein fixed to meet competitive prices or permit Buyer to cancel this agreement upon thirty (30) days' written notice to the Seller.

[fol. 174] Delivery to be made to the New England Steamship Company at Harsimus Pier, Jersey City, N. J., in approximately equal monthly quantities, commencing April 1, 1934 and terminating March 31, 1935, subject to the above mentioned contingencies.

The failure to deliver or receive coal in any month or months, on account of any of the above mentioned contingencies, shall not require (or give option to) either party to deliver or receive in subsequent month or months the amount of coal not shipped or received during the period of any such contingency.

Payments to be made on or before the twentieth of each month for coal dumped during the month next previous.

Railroad weights to govern settlements.

The Berwind-White Coal Mining Company, /s/ Charles E. Dunlap, President.

Accepted:

New England Steamship Company, /s/ C. E. Smith, Vice Pres.

[fol. 175] EXHIBIT 22

Contract No. NY 182-35

The Berwind-White Coal Mining Company

One Broadway, New York

Agreement made and entered into this seventeenth day of December 1934, whereby The Berwind-White Coal

Mining Company, a corporation of the State of Pennsylvania, hereinafter called the Seller, agrees to sell and Arbuckle Brothers of 71 Water Street, New York, N. Y., hereinafter called the Buyer, agrees to buy Bituminous Coal of the quantity and quality at the prices and on the terms, stipulations and conditions thereinafter set forth, less such amount as the Seller is unable to ship or the Buyer unable to receive on account of any strike, accident, contingencies of transportation or cause or causes beyond the control of either party effecting the mining, shipment, transportation, delivery or receipt of coal to be shipped hereunder.

Quantity; requirements estimated at about Five Thousand (5,000) net tons, Ten Percent (10%) more or less.

Kind and Grade of Coal: Berwind's C"—¾" Slack from #37 mine and/or #40 mine, at the option of the Seller, subject to the approval by the Buyer.

Contract Period: January 1st, 1935 to December 31st, 1935, inclusive.

Shipments: To be made to Arbuckle Bros. at the foot of Adams Street, Brooklyn, N. Y. in barges, in as near equal monthly proportions as possible.

[fol. 176] Price: No. 37 C"—¾" Slack—$5.046 per gross ton.

No. 40 C"—¾" Slack—$4.99 per gross ton.

The above prices are free alongside at the foot of Adams Street, Brooklyn, N. Y.

If, during the life of this contract, the Code price for the kind and grade of coal covered by this contract be reduced, then such reduced prices shall be substituted for the contract on all coal delivered hereunder while such reduced price is in effect.

Should the Coal Code and its resultant association be abandoned, the parties of this contract agree to and, on reasonable notice, will confer as to a fair market price for the coal to be delivered. If an agreement cannot be reached as to the price on coal to be delivered, the contract may be cancelled on thirty (30) day's notice.

Payment: Cash on or before the 20th day of each month for all coal shipped during the preceding month. All Settlements under this contract are to be governed by the actual railroad weights ascertained as the usual point at which shipments from the mines shipping hereunder are weighed.

The conditions on the reverse side hereof are hereby made a part of this contract.

The Berwind-White Coal Mining Company. /s/ F. D. Seymour. General Sales Manager.

Accepted:

Arbuckle Brothers. /s/ H. P. Pond, Pur. Agt.

[fol. 177] Conditions.

The purchase price of coal specified herein is based in part upon the present cost of production and upon present agreements with mine employees as to wages, and any increase or decrease in the cost of production of coal shipped hereunder caused by changes in such wage agreements shall operate to increase or decrease correspondingly, as the case may be, the price of the coal herein named; provided, that any such increase or decrease in wages shall not be applied to change the price specified herein unless it is a part of a general increase or decrease in the wages of the district in which the mine or mines of the producer, from which the coal is shipped, are located; likewise, any increase or decrease in the cost of production caused by the collection, under State or Federal statutes, to which the Seller is or may become subject, of any tax on coal, or on the mining or production thereof, or on payrolls or wages, or by any subsequent changes in the tax or in the rate thereof, or by Federal or State legislation operating to limit the hours of labor or affecting the conditions of labor, or by any other statute or regulation, State or Federal, increasing or decreasing the cost of production, shall correspondingly increase or decrease said price of coal on any tonnage thereafter shipped hereunder.

Upon presentation of the details with respect to the matters herein set out, affecting the cost of production of coal the Seller shall increase or decrease all invoices on the effective date thereof by the amount of any such increase or decrease, and issue a debit or credit memorandum for the amount of any such increase or decrease, provided any in-

[fol. 178] voices have been rendered at price in effect prior to said change. If freight is included in the price named herein and the present freight rates are changed, the Seller

shall receive the benefit of any advances and the buyer of any reductions therein.

The coal covered by this contract is to be used only in the plant or plants of the Buyer named herein and for the use stated and is not to be sold or diverted by the Buyer to other purposes without the consent of the Seller.

The Seller reserves the right to execute contracts for the sale of the entire estimated production of the mines controlled by the Seller and if the total actual output shall at any time, for any cause, be less than the sum total of deliveries called for by all the Seller's contracts then in force, the total available tonnage shall be applied pro rata on all said contracts alike, upon the basis of percentage of the total tonnage contracted and the Seller shall not be liable to make other or further deliveries for the period covered by such shortage or for damages for failure to deliver the full amount specified.

This agreement is subject in every respect to the rules and regulations of any Federal or State authority or authorities having jurisdiction in the premises to which the Seller is or may become subject.

[fol. 179] EXHIBIT 23

Contract No. N. Y.—107-34

Copy

The Berwind-White Coal Mining Company

Commercial Trust Building, Philadelphia, Pa.

Agreement made and entered into this thirtieth day of June, 1934, whereby The Berwind-White Coal Mining Company of Philadelphia, Pennsylvania, agrees to sell and the L. A. Dreyfus Company of Rosebank, Staten Island, New York, agrees to buy their requirements of bituminous steam coal, estimated at about one thousand five hundred (1500) gross tons, less such amount as the said Coal Company is unable to ship or the L. A. Dreyfus Company is unable to receive, on account of any strike, accident, contingency of transportation, or cause or causes beyond the control of either party, affecting the mining, shipment, transportation,

delivery or receipt of coal to be shipped under this agreement.

Kind of Coal: Berwind's Eureka Run-of-Mine, Berwind's C" Run-of-Mine or Berwind's C"—2" Stoker Coal, at the option of the Buyer.

Quantity: Buyer's requirements, estimated at about one thousand five hundred (1500) gross tons, ten per cent (10%) more or less.

[fol. 180] Price: Berwind's Eureka R/M $5.57 gross ton, Berwind's C" R/M 5.35 gross ton, Berwind's C"—2" Stoker 5.18 gross ton, alongside docks within New York Harbor limits.

Demurrage: Six (6) calendar days will be allowed free from date of delivery. Seven Dollars ($7.00) per day, per barge, will be charged thereafter.

Contract Period: August 1, 1934, to July 31, 1935, inclusive.

If during the life of this contract the Code price for the grade of coal covered by this contract be reduced, then such reduced price shall be substituted for the contract price on all coal delivered hereunder while such reduced price is in effect.

The purchase price of coal specified herein is based in part upon the present agreements with mine employees as to wages, and any increase or decrease in the cost of production of coal shipped hereunder caused by changes in such wage agreements, shall operate to increase or decrease correspondingly, as the case may be, the price of the coal herein named, provided, that any such increase or decrease in wages shall not be applied to change the price specified herein unless it is a part of a general increase or decrease in wages in the district in which the mine or mines of the producer, from which the coal is shipped, are located; likewise, any increase or decrease in the cost of production, [fol. 181] caused by the imposition, by State or Federal statutes, of a direct tax on coal, or on the sale or on the mining thereof, or by subsequent changes in the rate of such tax, or by Federal or State legislation operating to limit the hours of labor, or by any other regulations, State or Federal, increasing or decreasing the cost of production, shall correspondingly increase or decrease said price of coal on any tonnage thereafter shipped hereunder.

. . . . . .

If an advance in price should be made to an extent which the Buyer considers unfair, the Buyer will have the privilege of cancelling this agreement.

(Sgd.) L. A. Dreyfus Co., Walter A. Tyler, Vice-President, (Sgd.) Fred'k. D. Seymour.

. . . . . .

Upon presentation of the details with respect to the matters herein set out, affecting the cost of production of coal the Seller shall increase or decrease all invoices on the effective date thereof by the amount of any such increase or decrease, and issue a debit or credit memorandum for the amount of any such increase or decrease, provided any invoices have been rendered at price in effect prior to said change. If freight is included in the price named herein and the present freight rates are changed, the Seller shall receive the benefit of any advances and the Buyer of any reductions therein.

The coal covered by this contract is to be used only in the plant or plants of the Buyer named herein and for the use [fol. 182] stated and is not to be sold or diverted by the Buyer to other purposes without the consent of the Seller.

Shipments to be made to the L. A. Dreyfus Company, Rosebank, Staten Island, New York, alongside docks within the harbor limits of New York, in approximately equal monthly quantities, commencing August 1, 1934, and terminating July 31, 1935, subject to the above mentioned contingencies.

The failure to ship or receive coal in any month or months, on account of the above mentioned contingencies, shall not require (or give option to) either party to ship or receive in subsequent month or months the amount of coal not shipped or received during the period of any such contingency.

Payments to be made on or before the fifteen (15th) day of the month following month in which coal was shipped.

Railroad weights to govern settlements.

The Berwind-White Coal Mining Company, by (Sgd.) Fred'k. D. Seymour, Acting General Sales Manager.

Accepted: L. A. Dreyfus Company, by (Sgd.) Walter A. Tyler, Vice-President.

[fol. 183] EXHIBIT 24

Copy NY 107-35

The Berwind-White Coal Mining Company

1 Broadway, New York

Agreement made and entered into this—twenty ninth—day of July 1935, whereby The Berwind-White Coal Mining Company, a corporation of the State of Pennsylvania, hereinafter called the Seller, agrees to sell and L. A. Dreyfus Company of Rosebank, Staten Island, New York, hereinafter called the Buyer, agrees to buy Bituminous Coal of the quantity and quality at the prices and on the terms, stipulations and conditions hereinafter set forth, less such amount as the Seller is unable to Ship or the Buyer is unable to receive on account of any strike, accident, contingency of transportation or cause or causes beyond the control of either party affecting the mining, shipment, transportation, delivery or receipt of coal to be shipped hereunder.

Quantity: Buyer's requirements estimated at approximately One Thousand Five Hundred (1,500) gross tons.

Kind and Grade of Coal: Berwind's Eureka Run-of-Mine or
Berwind's C' (Prime) Run-of-Mine or
Berwind's C' (Prime) –2" Stoker coal.

Contract Period: August 1st, 1935 to July 31st, 1936 inclusive.

Shipments: To be made to L. A. Dreyfus Company, Rosebank, Staten Island, New York, as directed and in as nearly equal monthly proportions as possible.

Price: Eureka R/M..... $5.572 gr ton alongside Buyer's dock, St. Is., N. Y.
C' R/M..... 5.292 " " " " " " " " "
C'–2" Stoker..... 5.124 " " " " " " " " "

The emergency railroad freight surcharge of 16.8¢ per gross ton is to be added to the above prices so long as it is in effect.

If an advance in price should be made to an extent which the Buyer considers unfair, the Buyer will have the privilege of cancelling this agreement.

[fol. 184] Six (6) calendar days will be allowed free from date of delivery. Seven Dollars ($7.00) per day, per barge, will be charged thereafter.

Payment: Cash on or before the twentieth (20th) day of each month for all coal shipped during the preceding month. All settlements under this contract are to be governed by the actual railroad weights ascertained at the usual point at which shipments from the mines shipping hereunder are weighed.

The conditions on the reverse side hereof are hereby made a part of this contract.

The Berwind-White Coal Mining Company, (Sgd.) Fred'k D. Seymour, General Sales Manager.

Accepted: L. A. Dreyfus Company, (Sgd.) Walter A. Tyler, Vice-President.

Conditions

The purchase price of coal specified herein is based in part upon the present agreements with mine employees as to wages and any increase or decrease in the cost of production of coal shipped hereunder caused by changes in such wage agreements, shall operate to increase or decrease correspondingly, as the case may be, the price of the coal herein named; provided, that any such increase or decrease in wages shall not be applied to change the price specified herein unless it is a part of a general increase or decrease in wages in the district in which the mine or mines of the producer, from which the coal is shipped, are located; likewise, any increase or decrease in the cost of production, caused by the imposition, by State or Federal statutes, of [fol. 185] a direct tax on coal, or on the sale or on the mining thereof, or by subsequent changes in the rate of such tax, or by Federal or State legislation operating to limit the hours of labor, or by any other regulations, State or Federal, increasing or decreasing the cost of production, shall correspondingly increase or decrease said price of coal on any tonnage thereafter shipped hereunder.

Upon presentation of the details with respect to the matters herein set out, affecting the cost of production of coal the Seller shall increase or decrease all invoices on the effective date thereof by the amount of any such increase, and issue a debit or credit memorandum for the amount of any such increase or decrease, provided any invoices have been rendered at price in effect prior to said change. If freight is included in the price named herein and the present freight rates are changed, the Seller shall receive the benefit of any advances and the Buyer of any reductions, therein.

The coal covered by this contract is to be used only in the plant or plants of the Buyer named herein and for the use stated and is not to be sold or diverted by the Buyer to other purposes without the consent of the Seller.

The Seller reserves the right to execute contracts for the sale of the entire estimated production of the mines controlled by the Seller, and if the total actual output shall at any time, for any cause, be less than the sum total of the deliveries called for by all of the Seller's contracts then in force the total available tonnage shall be applied pro rata on all of said contract alike, upon the basis of the percentage of the total tonnage contract; and the Seller shall not be liable to make other or further deliveries for the period covered by such shortage or for damages for failure to deliver the full amount specified.

[fol. 186] EXHIBIT 25

Copy.

Austin, Nichols & Co., Inc.
Kent Ave. N 3rd St. and East River
Brooklyn, N. Y.

Date: 12-26-34.

Please furnish for our account on Order No. 1810M.

Price

2 cars R/M Bituminous Coal Berwind C, same as last—$2.25

Ship Monday December 31st.
" Wednesday, January 2nd.

To:
Berwind-White Coal Co.
1 Broadway, N. Y. C.

Charge to Engineer. Ordered by Mr. Farley.
Terms: FOB Deld. Mine—30 days.

(Sgd.) M. Mirabella.

Important: Invoice with bill of lading must be mailed to us on day of shipment. All invoices dated from the 10th to the 25th, inclusive are payable first of month; all from 26th to 9th, inclusive, payable 15th of month, less 2 per cent discount provided articles have been received. No charge for packages or drayage will be allowed. Freight and shipping charges must be prepaid on all goods purchased delivered. This company will not be responsible for goods furnished without an order from our Purchasing Agent.

Copy

[fol. 187] EXHIBIT 26

Copy

December 27, 1934.

Austin, Nichols & Co., Inc.,
Kent Ave. N. 3rd St. and E. River,
Brooklyn, N. Y.

GENTLEMEN:

We thank you for your Order 1810M, dated December 26th for two (2) cars of C R/M Coal, shipment 1 car each on December 31st and January 2nd, which will receive our careful attention.

Price—$2.25 net ton mines.

Yours very truly, The Berwind-White Coal Mining Company, (Sgd.) W. L. Lane.

Copy

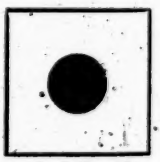
[fol. 188] EXHIBIT 27

Form No. 129.

Berwind's U. S. Atlantic Ports Coaling Contract

Berwind Coal

THE BERWIND-WHITE COAL MINING CO.
One Broadway
New York
Cable Address—"Berwind", New York



Berwind Service

Memorandum of Agreement

Entered into this 25th day of Nov., 1933 between The Berwind-White Coal Mining Co. (hereinafter called Suppliers), as Principals or Agents of the one part and

All America Cables, Inc.,
67 Broad Street,
New York City

(hereinafter called the Owners), of the other part.

1. The Suppliers agree to supply at the undermentioned Ports, subject in each case to a written order being placed

by the Captain in his capacity as such, and the Owners bind themselves to purchase, all the Bunker Coal normally required for the use of the steamers of which they are the owners, charterers or time-charterers, or in which they are otherwise interested, with coaling falling under their control.

2. New York $5.35 per gross ton, delivered alongside steamer at her dock within harbor limits, minimum quantity 250 tons. The coal to be Berwind's Standard Eureka.

3. Philadelphia $4.65 per gross ton, f.o.b. cars at railroad pier, subject to permission from the Railroad Company to bunker steamers alongside their coal pier.
[fol. 189] If delivery ex lighter is necessary, same to be according to the custom of the Port and extra costs for delivery ex lighter to be for account of Owners.
The coal to be Berwind's Standard Eureka.

4. Baltimore $4.60 per gross ton, f. o. b. cars at railroad pier, subject to permission from the Railroad Company to bunker steamers alongside their coal pier.
If delivery ex lighter is necessary, same to be according to the custom of the Port and extra costs for delivery ex lighter to be for account of Owners.
The coal to be Berwind's Standard Eureka.

5. Boston Current Price on date of delivery, the coal to be either Berwind's Standard New River or Berwind's Standard Pocahontas, Suppliers' option.

6. Newport News or Norfolk, (Suppliers' Option) $4.50 per gross ton, f. o. b. cars at railroad pier. The coal to be Berwind's Standard New River at Newport News and Berwind's Standard Pocahontas at Norfolk.

7. Should the Suppliers contract with any other steamship line at a lower price than that mentioned for any of the respective ports during the period of this contract, Owners are to receive the benefit of such reduction.

8. Payment for coals and/or disbursements and/or services rendered to be at Suppliers' option, in Cash before delivery, or as may be determined in agreement with Owners, or by honor of Captain's draft on Owners at not exceeding 30 days' sight, payable in New York, which draft the owner shall be bound to accept and pay at maturity, without right [fol. 190] of set-off or counterclaim. In the event of failure

to accept and/or pay any invoice and/or draft presented or drawn under this or any agreement between Owners and the Suppliers, this and all similar agreements with The Berwind-White Coal Mining Co., as Principals or Agents, shall be subject to cancelment forthwith by The Berwind-White Coal Mining Co.

9. Prices mentioned herein are subject to any increase or decrease in Railway rates, or mining costs including adjustments in wages; also to any conditions or regulations, or any direct taxes which may be imposed, by the Federal or State Governments.

10. It is further understood that in the event of War, Strikes, Riots, Lockouts, Interruptions of Transportation, whether general or partial, or other causes beyond Suppliers' control, affecting the normal working of this contract; the Suppliers, during the continuance of such events, and for so long as any such events affect the working of this contract, are to be relieved from all obligation under the contract, unless changed by mutual agreement.

11. This Contract shall remain in force from January 1st, or from date of signature if later, until December 31st, 1934.

The Berwind-White Coal Mining Co., (Sgd.) Geo. McCree, Assistant Manager, Foreign Department.

Accepted: All America Cables, Inc., (Sgd.) John K. Roosevelt, Vice-President.

[fol. 191] EXHIBITS 28-38

These exhibits are omitted. (See stipulation at page 195 hereof.) They are contracts between petitioner and the companies listed below, similar to the contract printed as Exhibit 27 at page 188 hereof, but covering the following periods:

Exhibit No.	Company	Period Covered
28	All America Cables, Inc	1/1/35—12/31/35
29	Clyde-Mallory Lines	1/1/34—12/31/34
30	Clyde-Mallory Lines	1/1/35—12/31/35
31	Compagnie Generale Transatlantique (French Line).	1/1/34—12/31/34
32	Compagnie Generale Transatlantique (French Line).	1/1/35—12/31/35
33	International Mercantile Marine Company	1/1/34—12/31/34
34	International Mercantile Marine Company	1/1/35—12/31/35
35	New York & Porto Rico Steamship Co	1/1/34—12/31/34
36	New York & Porto Rico Steamship Co	1/1/35—12/31/35
37	Compania Transatlantica (Spanish line)	1/1/34—12/31/34
38	Compania Transatlantica (Spanish line)	1/1/35—12/31/35

EXHIBIT 39

Ocean Dominion Steamship Corporation,
17 Battery Place, New York

March 5, 1934.

Berwind-White Coal Mining Company,
1 Broadway, New York City.

Attention Mr. A. Cory Davies

GENTLEMEN:

We confirm herewith our verbal agreement with regard to United States and West Indies bunkers, as follows:

[fol. 192] U. S. Bunkers—At Hampton Roads, New York, Philadelphia, Baltimore and Boston you agree to supply our bunker requirements at the best prices and terms available to other steamship operators under annual contract or otherwise, and we agree to take all our bunkers from you at Hampton Roads, except in cases where we are required to take bunkers from other suppliers under coal charters. And at the other U. S. ports mentioned, we agree to purchase our requirements from your insofar as quality, price and conditions can be met by you.

West Indies Bunkers—We will so far as possible confine our purchasers of bunkers in the West Indies to Port of Spain, Trinidad, and will purchase all our bunkers at that port from you or your subsidiary. The price y. i. b. is to be 2/6 over and above your c. i. f. cost of importation, but we are to have the privilege of purchasing our coal from you at Hampton Roads, Transporting it to Trinidad in our own vessels and having it received and stored by you under the arrangement formerly existing, your charge for discharging the vessels, etc. to be as formerly.

The above arrangement shall continue until December 31, 1934 and thereafter it shall continue automatically unless canceled by either party by the giving of ninety (90) days' written notice to the other.

I am writing this letter in duplicate and if it agrees with your ideas please sign both copies and return one for our office files.

Yours very truly, Ocean Dominion Steamship Corporation (Sgd.) Harmon Lewis, President.

Accepted: Berwind-White Coal Mining Company (Sdg.) A. Cory Davies.

[fol. 193] EXHIBIT 40

The Pennsylvania Railroad — Delivery Receipt

A. D. 5320-D

Received from The Pennsylvania Railroad Company in good condition the articles described below:

Waybill No. 3908 Date 1/4/35 Lading B Coal Size

From Eureka Coll 35 PA Foreign Billing reference L or F

Shipped Berwind White Coal Mining Co. Commodity Number

Consignee Berwind White Coal Mining Co. Weight of Car and Contents Tons

Classification Davy Capacity of car lbs.

Freight paid by

Car 20M 11x4 1/4 F 10 15 34

Initials BWCX Number 1651

Date Loaded

Transferred to Car No.

At Date

To Harsimus Cove Coal Pier NJ

Via

Destination

Via

Waybill Made at } Juniata Scales Pa.

Date of Received	Gross Weight	Tare Weight	Net Weight	Waybill Weight	Pounds
Report			104600		

Tariff Authority	Rate and Divisions	Freight Charges	Advances	Pre-paid
	272-G—	127 01		127 01

Consignee

[fol. 194]

EXHIBIT 41

Form 93.10M 5-34 E Demurrage at the Risk and Expense of Consignee

Eureka Pier
Harsimus, Jersey City, N. J.
The Berwind White Coal Mining Co.
Miners and shippers of the
Eureka Bituminous Coals
Commercial Trust Building
Philadelphia
1 Broadway, New York
80 Federal St.
Boston

No. 184 Shipped in good order and condition by The Berwind White Coal Mining Co. on board the Boat called the Eureka #105 of .....
whereof ..... is Master for this present Voyage, and now lying at the port of Jersey City, N. J., and bound for .....

Hudson Avenue, Brooklyn, N. Y.

Fourteen Hundred and Nine One Tons of 2240 pounds Berwind's Eureka R/M Coal
which I promise to deliver at the aforesaid Port of New York in like good order (the dangers of the Seas only excepted) unto Brooklyn Edison Co. Inc. or Their Assigns, he or they paying freight for the same at the rate of Agreed per ton.

In witness whereof the Master or Purser of the said Vessel hath affirmed to 5 Bills of Lading all of this tenor and date one of which being accomplished, the other to stand void.

Dated Jersey City N. J. 30 day of Jan. 1935.

1491 Tons

Joseph Cagne Master

Jersey City, N. J. 1 mo. 30 1935

Received on account of freight within cargo

Two Hundred Thirty Eight 56 Dollars 100

$238.56 100

Master

For additional advances see other side.

10—475

145

[fol. 195] IN SUPREME COURT OF NEW YORK.

Appellate Division—First Department

[Title omitted]

STIPULATION RE EXHIBITS OMITTED

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that copies of the taxpayer's above mentioned Exhibits 1, 11, 13, 14, 15, 16, 18, 20, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38, which have been omitted from this record, may be handed up to the Court at the argument by either party hereto; that such Exhibits may be referred to by either party hereto in his argument or briefs in the same manner and with the same force and effect as though such Exhibits were printed in full herein; and that the statements hereinbefore made, that each of Exhibits 11, 13, 14, 15, 16, 18, 20, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 is a contract similar to a certain other [fol. 196] contract printed in full herein as an exhibit, are true and correct.

Exhibit 1 is a power of attorney executed by the petitioner authorizing Edward S. S. Sunderland, Marion N. Fisher and Marvin Lyons to represent it before the New York City Department of Finance and to act for it in all matters relating to its asserted liability for New York City local taxes for the period from December 10, 1934, to December 31, 1935, inclusive. The other omitted exhibits are contracts between the petitioner and the companies listed below covering the periods listed below:

Exhibit No.	Company	Period Covered
11	Interborough Rapid Transit Company, Thomas E. Murray, Jr., Receiver	4/ 1/35- 3/31/36
13	The New York Edison Company	4/ 1/35- 6/16/35
14	The New York Edison Company	6/17/35- 3/31/36
15	The United Electric Light and Power Company	4/ 1/35- 6/16/35
16	The United Electric Light and Power Company	6/17/35- 3/31/36
18	Brooklyn Edison Company, Inc	4/ 1/35- 3/31/36
20	Williamsburgh Power Plant Corporation of Brooklyn, New York	6/ 1/35- 5/31/36
28	All America Cables, Inc	1/ 1/35-12/31/35
29	Clyde-Mallory Lines	1/ 1/34-12/31/34
30	Clyde-Mallory Lines	1/ 1/35-12/31/35
31	Compagnie Generale Transatlantique, Paris	1/ 1/34-12/31/34
32	Compagnie Generale Transatlantique, Paris	1/ 1/35-12/31/35

[fol. 197]
Exhibit

No.	Company	Period Covered
33	International Mercantile Marine Company	1/ 1/34-12/31/34
34	International Mercantile Marine Company	1/ 1/35-12/31/35
35	New York & Porto Rico Steamship Co	1/ 1/34-12/31/34
36	New York & Porto Rico Steamship Co	1/ 1/35-12/31/35
37	Compania Transatlantica, Barcelona	1/ 1/34-12/31/34
38	Compania Transatlantica, Barcelona	1/ 1/35-12/31/35

Dated, New York, N. Y., September 9, 1938.

Davis Polk Wardwell Gardiner & Reed,
Davis Polk Wardwell Gardiner & Reed,
Attorneys for Petitioner.

P B William C. Chanler,

William C. Chanler,
Corporation Counsel
Attorney for Respondent.

So ordered.
E. J. G.

[fol. 198] Document 4, Annexed to Return

This document is printed as Exhibit III annexed to Petition at page 29 hereof.

Document 5, Annexed to Return

This document is printed as Exhibit IV annexed to Petition at page 32 hereof.

Document 6, Annexed to Return

This document is printed as Exhibit V, annexed to Petition at page 34 hereof.

[fols. 199-200] In Supreme Court of New York

Waiver of Certification

It is hereby stipulated pursuant to Section 170 of the Civil Practice Act that the papers hereinbefore printed consist of true and correct copies of the order of certiorari, the petition and the respondent's return thereto, together with all the exhibits annexed to the petition and certain of the documents annexed to the return, upon which the respondent acted in making the determination sought to be reversed herein, and now on file in the office of the Clerk

of the County of New York; that certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived; and that the foregoing record may be filed in the office of the Clerk of the Appellate Division, First Department as and for the record on certiorari herein.

Dated New York, N. Y., September 15, 1938.

Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Petitioner. William C. Chanler, Corporation Counsel, Attorney for Respondent.

[fol. 201] In Supreme Court of New York, New York County

[Title omitted]

Notice of Appeal to the Court of Appeals

Sirs:

Please take notice that the respondent hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of December, 1938 and entered in the office of the Clerk of said Appellate Division on or about the 27th day of December, 1938, which order, among other things, sustains the order of certiorari and annuls the determination of the respondent herein, and the respondent appeals from each and every part of said Appellate Division order as well as from the whole thereof.

Dated, January 20, 1939.

[fol. 202] Yours etc., William C. Chanler, Corporation Counsel, Attorney for Respondent, Office and Post Office Address: Municipal Building, Borough of Manhattan, New York City.

To Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Attorneys for Petitioner, 15 Broad Street, Borough of Manhattan, New York City. Archibald R. Watson, Esq., Clerk of New York County.

[fol. 203] In Supreme Court of New York, Appellate Division

Present: Hon. Francis Martin, Presiding Justice; Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Justices.

In the Matter of the Application of

The Berwind-White Coal Mining Company, Petitioner,

against

Joseph D. McGoldrick, as Comptroller of the City of New York, Respondent

Order—Dec. 16, 1938

The above-named petitioner, The Berwind-White Coal Mining Company, having obtained an order of certiorari issued July 22, 1937 to review a final determination of the [fol. 204] Comptroller of the City of New York, in assessing against the petitioner a deficiency in New York City Sales Taxes of $176,703.89, consisting of $140,517.97 taxes and $36,185.92 penalties, under Local Law No. 20 of 1934 of the City of New York, as amended, for the period from December 10, 1934, to December 31, 1935, and said proceeding having come on to be heard before this Court on November 4, 1938, and having heard Davis, Polk, Wardwell, Gardiner & Reed by Marvin Lyons, of counsel, appearing on behalf of the petitioner, and William C. Chanler, by Milton Sandberg of counsel, appearing on behalf of the respondent, and due deliberation having been had thereon, it is hereby

Ordered that the order of certiorari be and the same hereby is sustained and that the determination of the Comptroller in assessing the tax and penalties above described in the amount of $176,703.89 be and the same hereby is annulled, with $50 costs and disbursements to the petitioner; and it is further

Ordered that the respondent refund to the petitioner the sum of $176,703.89, with interest thereon at 6% per annum from July 19, 1937.

Enter,

F. M.

[fol. 205] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION

(Reported 100 New York Law Journal 2195 on December 17, 1938)

Determination of the Comptroller, that the petitioner, The Berwind-White Coal Mining Company, is liable for a sales tax deficiency unanimously annulled, with $50 costs and disbursements to the petitioner, on the Authority of Matter of National Cash Register Co. v. Taylor (276 N. Y. 208), Matter of Compagnie Generale Transatlantique v. Taylor (279 N. Y. 192), decided November 29, 1938). The Comptroller is directed to make refund to petitioner of the tax and penalties paid, with interest thereon from the date of payment. Settle order on notice.

[fol. 206] WAIVER OF CERTIFICATION

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order and the opinion of the Appellate Division and all papers upon which said order are founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Sections 170 and 616 of the Civil Practice Act or otherwise is hereby waived.

Dated New York, February 21, 1939.

William C. Chanler, Corporation Counsel, Attorney for Defendant-Appellant. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Petitioner-Respondent.

[fol. 207] At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, in the Borough of Manhattan, City of New York, N. Y., on the 23rd day of June, 1939.

Present: Honorable John F. Carew, Justice.

In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY, Petitioner,

for a Certiorari Order against

JOSEPH D. McGOLDRICK, as Comptroller of the City of New New York, Respondent

ORDER ON REMITTITUR

The above named respondent, Joseph D. McGoldrick, as Comptroller of the City of New York, having appealed to the Court of Appeals of the State of New York from each and every part of the order of the Appellate Division of the Supreme Court, First Judicial Department, dated the 16th day of December, 1938, and entered in the office of the Clerk of said Appellate Division on or about the 27th day of December, 1938, which order sustains the order of certiorari, annuls the determination of the Comptroller, with $50 costs and disbursements to the petitioner, and orders the respondent herein to refund to the petitioner the sum of $176,703.89, with interest thereon at 6% per annum from July 19, 1937, [fol. 208] and the said appeal having been duly argued in the Court of Appeals, and the said Court of Appeals having ordered and adjudged on the 21st day of June, 1939, that the said order of the Appellate Division of the Supreme Court, First Judicial Department, be affirmed with costs, and a certified copy of the order of the said Court of Appeals having been duly filed in the office of the Clerk of the County of New York,

Now, on motion of Davis, Polk, Wardwell, Gardiner & Reed, attorneys for the petitioner, it is

Ordered, Adjudged and Decreed that the said order of the Court of Appeals be and it hereby is made the order of this Court, and the Clerk is hereby directed to enter judgment accordingly.

Enter, J. F. C., J. S. C.

[fol. 209] SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY, Petitioner,

for a Certiorari Order against

JOSEPH D. McGOLDRICK, as Comptroller of the City of New New York, Respondent

JUDGMENT OF AFFIRMANCE

The above named respondent, Joseph D. McGoldrick, as Comptroller of the City of New York, having appealed to the Court of Appeals of the State of New York from each and every part of the order of the Appellate Division of the Supreme Court, First Judicial Department, dated the 16th day of December, 1938, and entered in the office of the Clerk of said Appellate Division on or about the 27th day of December, 1938, which order sustains the order of certiorari, annuls the determination of the Comptroller, with $50 costs and disbursements to the petitioner, and orders the respondent herein to refund to the petitioner the sum of $176,703.89, with interest thereon at 6% per annum from July 19, 1937, and the said Court of Appeals having on the 21st day of June, 1939, ordered and adjudged that the said order of the Appellate Division of the Supreme Court, First Judicial Department, be affirmed with costs, and a certified copy of the order of the said Court of Appeals having been duly filed [fol. 210] in the office of the Clerk of the County of New York, and an order having been entered herein on the day of June, 1939, making the said order of the Court of Appeals an order of this Court, and said costs having been duly taxed by the Clerk of this Court, it is, on motion of Davis, Polk, Wardwell, Gardiner & Reed, attorneys for the petitioner,

Adjudged that the order of the Appellate Division of the Supreme Court, First Judicial Department, dated the 16th day of December, 1938, and entered in the office of the Clerk of the said Appellate Division on or about the 27th day of December, 1938, ordering that the order of certiorari be sustained and that the determination of the Comptroller in assessing the tax and penalties described in the said order of the said Appellate Division in the amount of $176,703.89 be annulled, with $50 costs and disbursements to the petitioner, and that the respondent refund to the

petitioner the sum of $176,703.89, with interest thereon at 6% per annum from July 19, 1937, be and the same hereby is in all respects affirmed, and it is further

Adjudged that the petitioner, The Berwind-White Coal Mining Company, whose address is No. 1 Broadway, New York, N. Y., recover of the respondent, Joseph D. McGoldrick, as Comptroller of the City of New York, whose address is the Municipal Building of the City of New York, Borough of Manhattan, City of New York, N. Y., the sum of $159.06 dollars costs and disbursements, and that the said petitioner have execution therefor.

Dated, New York, N. Y., June 24th, 1939.

Archibald R. Watson, Clerk.

[fol. 211] Supreme Court, New York County

In the Matter of the Application of The Berwind-White Coal Mining Company, Petitioner-Respondent,

for a certiorari order against

Joseph D. McGoldrick, as Comptroller of the City of New York, Defendant-Appellant

State of New York,
County of New York,

John A. Leddy, being duly sworn, says that he is the Assistant Chief Clerk in the office of the Corporation Counsel of the City of New York, the attorney for the defendant-appellant in the above cause.

Deponent says that no opinion was written or handed down by the Court of Appeals in deciding the appeal in this cause.

John A. Leddy.

Sworn to before me, this 11th day of October, 1939.
Frank Surowitz, Notary Public, Bronx County.

Bronx Co. Clks. No. 207, Reg. No. 18284.
Kings Co. Clks. No. 324, Reg. No. 621.
N. Y. Co. Clks. No. 930, Reg. No. 08639.
Queens Co. Clks. No. 557, Reg. No. 253.
Commission Expires March 30, 1940.

[fol. 212] [Reg. 227. Fol. 229]

(27165)

COURT OF APPEALS, STATE OF NEW YORK

No. 1506

In the Matter of the Application of BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent,

for an order of certiorari against

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Defendant-Appellant

NOTICE OF MOTION TO AMEND THE REMITTITUR OF THIS COURT, OR FOR ALTERNATIVE RELIEF, WITH SUPPORTING AFFIDAVIT

Dated, New York, N. Y., September 20, 1939.
William C. Chanler, Corporation Counsel, Attorney for Defendant-Appellant.

William C. Chanler, Sol Charles Levine, Milton Sandberg, of Counsel.

[fol. 213] COURT OF APPEALS, STATE OF NEW YORK

In the Matter of the Application of BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent

for an order of certiorari against

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Defendant-Appellant

NOTICE OF MOTION

SIRS:

Please take notice that upon the annexed affidavit of William C. Chanler, verified the 20th day of September, 1939, the papers on appeal, and all the proceedings heretofore had herein, the undersigned will move this Court at a session thereof to be held at the Court of Appeals Hall, Albany, New York, on Monday, the 25th day of September, 1939, at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order

(a) recalling the remittitur herein;

(b) granting reargument of the appeal herein, and upon such reargument being granted, reversing the order appealed from;

[fol. 214] (c) or, in the alternative, in the event the order appealed from be not reversed, amending the remittitur of this Court, dated June 21, 1939, by inserting after the words "be and the same hereby is affirmed with costs," the words, "upon the sole ground that the City sales tax law as here applied violates the Commerce Clause (Art. I, sec. 8, cl. 3) of the Constitution of the United States";

and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., September 20, 1939.

Yours, etc., William C. Chanler, Corporation Counsel of the City of New York, Attorney for Defendant-Appellant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

To: Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Attorneys for Petitioner-Respondent, 15 Broad Street, Borough of Manhattan, New York City, N. Y.

John Ludden, Esq., Clerk of the Court of Appeals.

[fol. 215] AFFIDAVIT IN SUPPORT OF MOTION

COURT OF APPEALS, STATE OF NEW YORK

In the Matter of the Application of BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent,

for an order of certiorari against

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Defendant-Appellant

STATE OF NEW YORK,
County of New York, ss:

William C. Chanler, being duly sworn, deposes and says:

1. I am Corporation Counsel of the City of New York, and am familiar with the proceedings in this case.

2. The within appeal involved the validity under the Commerce Clause of the Federal Constitution of the New York

City sales tax, imposed by Local Law No. 20 of 1934, as amended, as applied to respondent's sales in New York City of coal shipped from its mines in Pennsylvania.

[fol. 216] 3. On June 21, 1939, this Court affirmed without opinion the order of the Appellate Division, First Department, which invalidated the City sales tax as applied to these sales, on the ground that it constituted a burden on interstate commerce (281 N. Y., mem. p. 34). The remittitur affirming the order of the Appellate Division, First Department, directed that judgment be entered in accordance with this Court's opinion; and such judgment was entered on June 24, 1939.

4. The appellant desires to apply to the Supreme Court of the United States for a writ of certiorari to review this Court's decision. By order of Mr. Justice Reed, dated September 7, 1939, the City's time to file with the United States Supreme Court a petition for certiorari was extended for a period of 30 days from September 24, 1939.

5. On June 5, 1939, the Supreme Court of the United States granted the request of this appellant that writs of certiorari be issued to review previous decisions of this Court in connection with the validity of the New York City sales tax under the Commerce Clause in Matter of Compagnie Générale Transatlantique v. McGoldrick, 279 N. Y. 192 (1938), certiorari granted 307 U. S. —, and in Matter of Felt & Tarrant Mfg. Co. v. McGoldrick, 279 N. Y. 678 (1938), certiorari granted 307 U. S. —. These cases are now pending on the docket of the United States Supreme Court.

6. Prior to that date this appellant had requested this Court to amend the remittiturs in those two proceedings to [fol. 217] make it clear that the decision in favor of the taxpayer was based solely on the ground that the Federal Constitution had been contravened; and this Court had granted such request, inserting in each case the words "upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (article 1, section 8, clause 3) of the Constitution of the United States" (280 N. Y. 688, 691).

7. In the two earlier cases of Matter of National Cash Register Co. v. Taylor, 276 N. Y. 208 and Matter of West Publishing Company v. Taylor, 276 N. Y. 535, the petition

of the City for certiorari was denied (303 U. S. 656 [1938]). It is likely that the denial in those cases was based on the Supreme Court's view that they did not present an exclusively federal question. At least one commentator has taken this position and has stated that certiorari was denied in those cases because of the existence of a state question under the state enabling act. Lockhart, The Sales Tax in Interstate Commerce, 52 Harvard Law Review, 617, 619, note 14 (1939). The granting of certiorari in the French Line and Felt & Tarrant cases after this Court had amended the remittitur lends support to this view.

8. It is extremely important to the appellant that there be no doubt on the part of the Supreme Court that the case at bar was decided upon exclusively federal grounds. This case involves not only question of great public importance but also the substantial sum of $176,703.89. Unless the way is left open for the granting of certiorari in this case, the City may be in the position of prevailing over the French [fol. 218] Line and Felt & Tarrant companies in the United States Supreme Court, yet left without redress against the similarly situated taxpayer here.

9. There is no difference between this case and the French Line and Felt & Tarrant cases in respect to the existence of an enabling act, or other state question. In those cases, this Court amended the remittitur so as to show that an exclusively federal question was the basis of its decision.

The citation by the Appellate Division (255 App. Div. 961) of the National Cash Register case possibly suggests that it had in mind a state question, which had been discussed in its opinion in that case (252 App. Div. 90). As this Court, in affirming, wrote no opinion, it would seem incumbent upon us to move to eliminate any such suggestion by the amendment of the remittitur.

Wherefore, your deponent prays that reargument be granted, and upon such reargument, that the order appealed from be reversed; or, in the alternative, that the remittitur and opinion be amended to show that the decision raised a federal question under the Commerce Clause, and no other questions.

William C. Chanler.

Sworn to before me this 20th day of September, 1939.
Daniel W. Kingston, Notary Public, Kings County.

N. Y. Co. Clerk's No. 104, Reg. No. 0-K-64.
Bronx Co. Clerk's No. 3, Reg. No. 5-K-40.
Kings Co. Clerk's No. 12, Reg. No. 117.
Queens Co. Clerk's No. 60, Reg. No. 636.
Certificate Filed in Richmond County.
Commission Expires March 30, 1940.

[fol. 219] STATE OF NEW YORK IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twenty-seventh day of September, A. D. 1939.

Present, Hon Frederick E. Crane, Chief Judge, Presiding.

In the Matter of The Application of BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent,

For an Order of Certiorari vs.

JOSEPH D. McGOLDRICK, Comptroller of the City of New New York, Defendant-Appellant

A motion for a reargument of or to amend the remittitur in the above cause having been heretofore made upon the part of the defendant-appellant herein, papers having been duly submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion for reargument be and the same hereby is denied and the remittitur amended by adding after the words "be and the same hereby is affirmed with costs" the words "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art 1, Sec. 8, Cl. 3) of the Constitution of the United States."

And the Supreme Court of the State of New York, County of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Rufus Kimball, Deputy Clerk. (Seal.)

[fol. 220] COURT OF APPEALS,
State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of June in the year of our Lord one thousand nine hundred and thirty-nine, before the Judges of said Court.

Witness, The Hon. Frederick E. Crane, Chief Judge, Presiding.

John Ludden, Clerk.

Remittitur, June 21, 1939.

[fol. 221] In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY &c.

ag'st.

JOSEPH D. MCGOLDRICK, as Comptroller of The City of New York

Be It Remembered, That on the 4th day of April in the year of our Lord one thousand nine hundred and thirty-nine Joseph D. McGoldrick, as Comptroller of The City of New York the appellant in this cause, came here unto the Court of Appeals, by William C. Chanler, his attorney, and filed in the said Court a Notice of Appeals and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The Berwind-White Coal Mining Company the respondent in said cause, afterwards appeared in said Court of Appeals by Davis, Polk, Wardwell, Gardiner & Reed, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Marvin Lyons, of counsel for the respondent, and submitted by counsel for the appellant, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

[fol. 222] And afterwards, to wit, on the 27th day of September 1939 an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 21, 1939.

I hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 223] At a Special Term, Part II of the Supreme Court, held in and for the County of New York, at the New County Court House in the Borough of Manhattan, City of New York, on the 11th day of October, 1939.

Present: Hon. Julius Miller, Justice.

In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent,

For a Certiorari Order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Defendant-Appellant

The defendant-appellant having moved at the Court of Appeals for a reargument of the appeal herein or to amend the remittitur of the Court of Appeals in the above cause, and the Court of Appeals, in an order dated the 27th day

of September, 1939, having ordered that the said motion for reargument be denied and that the remittitur be amended by adding after the words "be and the same hereby is affirmed with costs" the words "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art 1, Sec. 8, Cl. 3) of the Constitution of the United States",

Now on motion of William C. Chanler, Corporation Counsel of the City of New York, attorney for the defendant-appellant, it is

[fol. 224] Ordered that the said order of the Court of Appeals amending the said remittitur be and the same hereby is made the order of this Court.

Enter, J. M., J. S. C.

[fol. 225] COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent,

for a certiorari order against

JOSEPH D. McGOLDRICK, as Comptroller of the City of New York, Defendant-Appellant

I, Archibald R. Watson, Clerk of the Supreme Court of the State of New York, County of New York, and Clerk of the County of New York, do hereby certify that the foregoing consists of a true, full, correct and complete copy of the printed record on appeal to the Court of Appeals of the State of New York in the above entitled proceeding upon which the said Court of Appeals acted and which has been certified to this Court by the said Court of Appeals, and a true, full, correct and complete copy of the following papers, to wit: the order of the Supreme Court entered on the remittitur from the Court of Appeals; the judgment of the Supreme Court entered on the remittitur from the Court of Appeals; the affidavit of no opinion by the Court of Appeals; the notice of motion for reargument and to amend the remittitur of the Court of Appeals, with the supporting affidavit; the order of the Court of Appeals upon the granting of the motion to amend the remittitur; the amended remittitur from the Court of Appeals and the order of the Supreme Court making the order and amended

remittitur of the Court of Appeals the order of the Supreme Court, all of which are on file in this office.

In Witness Whereof I have hereunto set my hand and affixed my seal the 13th day of October, 1939.

Archibald R. Watson, Clerk. (Seal.)

[fol. 226] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. —

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Petitioner,

against

A. H. DuGRENIER, INC.

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRITS OF CERTIORARI

On consideration of the motions of counsel for petitioner in the above-entitled causes, and good cause therefor having been shown,

It is Now Here Ordered that the time within which petitions for writs of certiorari may be filed herein be, and the same is hereby, extended for a period of 30 days from September 24, 1939.

Dated, this 7th day of September, 1939.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Endorsed on cover: File No. 43,882. New York, Supreme Court. Term No. 475. Joseph D. McGoldrick, Comptroller of the City of New York, petitioner, vs. Berwind-White Coal Mining Company. Petition for a writ of certiorari and exhibit thereto. Filed October 18, 1939. Term No. 475. O. T., 1939.

[fol. 227] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 4, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted, and the case is assigned for argument immediately following No. 474.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.